Supreme Court
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No. 03-___

IN THE

Supreme Court of the United States

PT PERTAMINA (PERSERO), F/K/A PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA,
Petitioner,

v.

KARAHA BODAS COMPANY, L.L.C.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") authorizes courts to decline enforcement of a foreign arbitral award when "[t]he composition of the arbitral authority . . . was not in accordance with the agreement of the parties." Art. V(1)(d). The United States is a party to the New York Convention, which is implemented domestically via Chapter 2 of the Federal Arbitration Act (the "FAA"). This case presents the following questions pertaining to the composition of the arbitral panel:

1. Whether the FAA-derived standard for declining enforcement of a domestic arbitral award for failure to comply with the parties' agreed method of arbitrator selection applies equally to cases in which enforcement is sought pursuant to the New York Convention.

2. Whether the court below, in conflict with the Second, Fourth, Eighth, and Eleventh Circuits, improperly deferred to the arbitrators' interpretation of the underlying arbitration agreements in sustaining their appointment, when the method of their appointment conflicted with the plain language of the parties' agreements, and when Petitioner timely and unmistakably challenged the method of selection employed.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption of the decision of the U.S. Court of Appeals for the Fifth Circuit, Pet. App. 1a, except that Petitioner became a limited liability company under Indonesian law as of September 18, 2003, and is now named PT Pertamina (Persero).

Pursuant to Rule 29.6 of the Rules of this Court, Petitioner PT Pertamina (Persero) states that it is wholly owned by (but a separate juridical entity from) the Government of the Republic of Indonesia.

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PETITION FOR WRIT OF CERTIORARI

Petitioner PT Pertamina (Persero), f/k/a Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina"), respectfully petitions for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals is reported at 364 F.3d 274 (5th Cir. 2004), and appears in the Appendix of this Petition ("Pet. App.") at 1a-55a. The judgment of the United States District Court for the Southern District of Texas is reported at 190 F. Supp. 2d 936 (S.D. Tex. 2001), and appears at Pet. App. 56a-90a. The Fifth Circuit's limited

remand order to permit consideration of Pertamina's motion to set aside the judgment pursuant to Fed. R. Civ. P. 60(b) is reported informally at 2003 WL 21027134 (5th Cir. Mar. 5, 2003), and appears at Pet. App. 91a-101a. The district court entered orders on April 17, June 2, June 12, and July 16, 2003, in respect of Pertamina's Rule 60(b) motion. The April 17 order is reported at 264 F. Supp. 2d 490 (S.D. Tex. 2003), and appears at Pet. App. 102a-122a. The other three orders are unreported and appear at Pet. App. 123a-141a, 142-143a, and 144a-150a, respectively. The Preliminary Award of the arbitral tribunal, dated September 30, 1999, appears at Pet. App. 151a-200a, and the Final Award of the arbitral tribunal, dated December 18, 2000, appears at Pet. App. 201a-263a.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its final judgment on March 23, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

TREATY AND STATUTORY PROVISIONS INVOLVED

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 (the "New York Convention"), provides in pertinent part:

> Article V
>
> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where recognition and enforcement is sought, proof that:
>
> (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have sub-

jected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of the award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

The New York Convention is implemented in the United States via Chapter 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 201 et seq. Chapter 2 of the FAA provides in pertinent part:

> § 201. Enforcement of Convention
>
> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.
>
> * * * *
>
> § 208. Chapter 1; residual application
>
> Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

STATEMENT OF THE CASE

In its decision below, the Fifth Circuit rejected Pertamina's challenge to enforcement of an arbitral award of over $261 million in favor of Respondent Karaha Bodas Company, L.L.C. ("KBC"), a Cayman Islands company. The arbitration concerned a geothermal energy project in Indonesia that was postponed by the Indonesian government due to the Asian financial crisis of 1997. The award includes $150 million for assumed lost future profits from electric generating facilities that were never constructed, contracted for, or financed.

The award resulted from a proceeding in which the arbitrators were selected by a method imposed by KBC that conflicted with the plain terms of the underlying arbitration agreements and was justified after-the-fact by the arbitrators over Pertamina's timely and strenuous objection. Despite an arbitration agreement that provided that KBC and Pertamina, on the one hand, and PT PLN (Persero) ("PLN," another party to the arbitration), on the other hand, were each to select

an arbitrator, the court permitted a procedure under which KBC selected an arbitrator for itself, and Pertamina was required to select a single arbitrator together with PLN and the Republic of Indonesia, yet a further party to the arbitration at the time.

In accepting the arbitrators' material deviation from the parties' agreements rather than strictly enforcing those agreements, the decision below conflicts with the decisions of the Second, Fourth, Eighth, and Eleventh Circuits. *See Hugs & Kisses, Inc. v. Aguirre*, 220 F.3d 890, 893 (8th Cir. 2000); *Cargill Rice, Inc. v. Empresa Nicaraguense Dealimentos Basicos*, 25 F.3d 223, 226 (4th Cir. 1994); *Szuts v. Dean Witter Reynolds, Inc.*, 931 F.2d 830, 831 (11th Cir. 1991); *Avis Rent A Car Sys., Inc. v. Garage Employees Union*, 791 F.2d 22, 25 (2d Cir. 1986). As the *Avis* court explained, "Courts generally enforce [arbitration clauses] strictly, vacating awards entered by arbitrators whose qualifications or method of appointment fail to conform to arbitration clauses." *Id.* Because this is an important and recurring issue, review is warranted.

Structure of the New York Convention

The drafters of the New York Convention understood that judicial recognition of international arbitration awards must also include some elements of judicial control. Courts would be unwilling to place their imprimatur on arbitral awards if there were not some assurance that the awards and the procedure producing them meet, at the least, universally recognized standards of fair treatment and consent. "Too much autonomy for the arbitrators creates a situation of moral hazard. If abuses occur, and the theory of moral hazard holds that they are more likely to in the absence of controls, national courts will become increasingly reluctant to grant what amounts to a preferred, fast-track enforcement of awards." W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION 113

(1992). The Convention's function is thus "to unify the standards by which agreements to arbitrate are observed and arbitral awards enforced in the signatory countries." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974).

The Convention recognizes two types of control. First, courts of the country in which or under the law of which the award was made—often called courts of primary jurisdiction—have plenary control of the award and may set the award aside on any basis provided by such country's law. Pet. App. 12a-15a; *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 21-23 (2d Cir. 1997). The Convention does not purport to limit the grounds on which a primary jurisdiction may act because "such action would have constituted meddling with national procedure for handling domestic awards, a subject beyond the competence of the conference." Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049, 1070 (1960), *quoted in Alghanim*, 123 F.3d at 22-23.

Second, courts in all other jurisdictions in which the award is sought to be enforced—so-called secondary jurisdictions—are limited to deciding whether to enforce the award, and the grounds for declining enforcement are limited to those specified in Article V, reproduced *supra* pp. 2-3. Pet. App. 13a-15a. Among those grounds is that the award has been set aside by a court of primary jurisdiction, Art. V(l)(e), and in this way the decisions of primary jurisdiction courts have extraterritorial effect. Decisions of a court of secondary jurisdiction have effect only within that jurisdiction's territory. W. MICHAEL REISMAN, *supra*, at 114. In this case, KBC has invoked the secondary-jurisdiction authority of U.S. courts to enforce the award. One ground for declining enforcement is that "[t]he composition of the arbitral authority . . . was not in accordance with the agreement of the parties," Art. V(1)(d).

Background to the Award

The arbitration at issue concerned two contracts to permit KBC to develop geothermal resources and then produce electricity in Indonesia. The KBC project was one of over 75 infrastructure projects postponed or suspended under a Government decree issued at the insistence of the International Monetary Fund and the U.S. in the midst of the desperate economic crisis that befell Indonesia in late 1997 and early 1998. Although KBC never got past resource exploration, never so much as broke ground to construct any generating facility, and never generated a single watt of electricity, the arbitral panel awarded KBC $111.1 million for claimed expenditures, plus $150 million in "lost profits" on conjectural future electricity sales.

In November 1994, KBC entered into two separate contracts: the Joint Operation Contract ("JOC") between KBC and Pertamina, Indonesia's state-owned oil and gas company, and the Energy Sales Contract ("ESC") among KBC, Pertamina, and PLN, Indonesia's state-owned electric utility. Both contracts are governed by Indonesian law. Pet. App. 4a, 18a & n.30.

The two contracts, while related, cover distinct matters. The JOC establishes the perimeters of the concession area and the rights and obligations of KBC and Pertamina concerning KBC's activities in the exploration and development of geothermal energy in the Karaha-Telaga Bodas region of West Java. *See* Pet. App. 202a. The ESC, on the other hand, governs the sale to PLN of electricity produced from any generating facilities that might be constructed by KBC. *See* Pet. App. 203a. Under the contracts, Pertamina would serve as a pass-through for payments between PLN and KBC for the sale of electricity.

Both contracts include comprehensive Consultation and Arbitration sections, materially identical but for one critical

exception, concerning the selection of arbitrators. The only parties to the JOC—KBC and Pertamina—are each to appoint a single arbitrator under that contract, and those two arbitrators select a third as chairman. Pet. App. 153a-154a. The ESC arbitration clause recognized not only the tri-party nature of that contract, but also that ***KBC's and Pertamina's interests are aligned*** in the sale of electricity. The ESC thus provides that "PLN on one hand, and COMPANY [i.e., KBC] and PERTAMINA, on the other hand, will each appoint one arbitrator, . . . who will then jointly appoint a third arbitrator . . . to act as Chairman of the Tribunal." Pet. App. 157a. Under either arbitration clause, arbitrators not appointed within the time allotted may be selected by the Secretary General of the International Centre for the Settlement of Investment Disputes ("ICSID"). Pet. App. 154a, 157a.[1]

By September 1997, the Indonesian economy had succumbed to the crisis then enveloping other Asian countries. To try to restore confidence and stability, the Government approached the International Monetary Fund ("IMF") for an emergency aid package. Among other IMF concerns was that the Government limit its exposure to infrastructure projects that carried, or could in the future result in, dollar-payment obligations. *See* R.3745-3730; *see also* R.918, R.916.[2]

In response to IMF pressure, on September 20, 1997, the Government issued a Presidential Decree that mandated that certain such projects should proceed, others should be reviewed, and still others postponed. The Karaha Bodas project was among those to be postponed. In November 1997,

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[1] The full texts of the JOC and ESC Consultation and Arbitration sections are set out at Pet. App. 153a-155a and 156a-158a, respectively.

[2] Citations to "R." are to the original Record on appeal in the Fifth Circuit; "TSR" citations refer to the Third Supplemental Record on appeal in the Fifth Circuit.

the Government restored the Karaha Bodas project to active status. Pet. App. 159a. But under continued pressure from the IMF and the United States "to force Indonesia to swallow its bitter economic medicine," R.3647, the Indonesian Government issued Presidential Decree No. 5/1998 on January 10, 1998, reinstating the "postponed" status for the Karaha Bodas project (among others). Pet. App. 160a. KBC then invoked *force majeure* and ceased performance under the contracts. Pet. App. 6a.

The Arbitration Proceedings

On April 30, 1998, KBC initiated a single arbitration alleging that Pertamina, PLN, and the Government of Indonesia breached the JOC and ESC. Although Pertamina was named as a respondent, that was only a formality, according to KBC's President Robert McCutchen. Uncontroverted testimony, supported by contemporaneous documentation, showed that: Mr. McCutchen personally delivered the Notice of Arbitration to Pertamina on April 30; the recipient (an engineer whose native language is not English) did not know what it was or meant, so he asked Mr. McCutchen to explain; McCutchen responded that KBC had "no dispute or quarrel with Pertamina"; the Notice was a "***formality***"; ***no action need be taken*** by Pertamina; and the Notice should be simply filed away (and it was). R.1930-1927. In June, McCutchen reiterated in writing that KBC "has no conflict to date or in the past" with Pertamina. R.1928, R.3709; *see* Pet. App. 222a.

With service of its Notice of Arbitration, KBC appointed Piero Bernardini as its arbitrator. Because of McCutchen's statement to Pertamina that KBC was serving the notice only as a formality and that Pertamina need not take action, and because Pertamina and PLN believed the arbitration had been initiated improperly and the Government was not a proper party, neither Pertamina nor PLN (nor the Government) appointed an arbitrator. Despite the language of the ESC

requiring that ***KBC*** and Pertamina jointly appoint a single arbitrator, the Secretary General of ICSID instead appointed a single arbitrator, Ahmed El-Kosheri, for Pertamina and ***PLN*** (and the Government). Mr. Bernardini and Mr. El-Kosheri appointed Yves Derains as Chairman of the tribunal. Pet. App. 160a-162a.

1. The Preliminary Proceedings

In preliminary proceedings before the tribunal, the Government, PLN, and Pertamina raised threshold challenges to the arbitration, among them: (1) that the Government was not a proper party to the arbitration, (2) that claims under the separate contracts could not be joined in a single arbitration, and (3) that KBC had unilaterally appointed an arbitrator without Pertamina's concurrence, contrary to the express provisions of the ESC. In a Preliminary Award dated September 30, 1999, the tribunal dismissed the Government because the Government was not a party to any relevant arbitration agreement and was neither the alter ego nor agent of Pertamina or PLN, but denied all other relief. Pet. App. 162a-164a, 172a-178a, 199a; *see also* Pet. App. 6a, 60a.

As concerns selection of the arbitrators, the tribunal rejected KBC's contention that Pertamina and PLN "forfeited their right to nominate an arbitrator, whether individually or jointly." Pet. App. 192a. The tribunal considered the involvement of ICSID, and Pertamina's and PLN's interaction with the process, "irrelevant in the discussion" because "this failure to nominate one or several arbitrators could not give the Secretary General of the ICSID the power to make an appointment in breach of the parties' arbitration agreements." Pet. App. 192a-193a.

The tribunal nevertheless sanctioned just such a breach. The tribunal gave controlling significance to section 8.2(a) of the tri-party ESC, which requires KBC and Pertamina to appoint one arbitrator jointly and PLN to appoint another one,

Pet. App. 194a-195a, but then read it out of the contract. Despite the fact that the clause applies to "any dispute or difference of any kind whatsoever," ESC § 8.1, Pet. App. 156a, the tribunal concluded that its procedure should apply only to a dispute in which KBC and Pertamina are aligned on one side and PLN on the other and divined that for any other dispute–whether a two-party dispute or a three-party dispute in which KBC is opposed to Pertamina and PLN–the parties did not specify the means of selection. Pet. App. 194a-195a. Moreover, because in its view the parties did not provide the means of selection for the dispute at hand, they were then bound to follow UNCITRAL Rules 5 and 7, which specify the appointment of three arbitrators, one by each party and the third by the other two arbitrators–which cannot apply directly in a three-party dispute. Instead, regrouping would be necessary, and the tribunal (a) accepted KBC's regrouping of Pertamina, PLN, and the Government on one side, and (b) interpreted the ESC as implying that in any such regrouping each "side" must appoint an arbitrator. Pet. App. 196a. Finally, the tribunal concluded that KBC's ability to select an arbitrator did not create an inequality because of the requirement that a party-designated arbitrator not serve simply as the agent of the appointing party. Pet. App. 196a-197a.

2. The Merits Phase

As directed by the tribunal, KBC filed a Revised Statement of Claim on November 24, 1999, in which KBC alleged that Pertamina and PLN breached or repudiated both contracts and sought lost expenditures damages of $96 million and lost future profits damages of $512.5 million. Pet. App. 216a-217a.

Pertamina's and PLN's response denied KBC's claim of breach, and demonstrated that Pertamina and PLN tried to have the Decree reversed and otherwise continued to work with KBC. They also demonstrated that KBC's claims could

not be sustained because KBC could not have performed even if there had been no Decree: Indonesia's collapsed economy—not any alleged breach of contract—made it impossible to borrow the $500 million necessary to construct a 210 MW generating facility (on which KBC's damages claim was based); indeed, KBC could not have recovered its costs or generated any profit. Pet. App. 221a-222a.

Third-party, non-recourse financing had been expressly contemplated in the contracts, in KBC's pre-arbitration statements to the Government, Pertamina, and others, and in KBC's own earlier statements in the arbitration. R.3175, R.3162, R.4542-4490, R.3653-3649, R.3016, R.3673. However, in its "Rebuttal," submitted only six weeks before the scheduled final hearing, KBC changed its case dramatically. KBC acknowledged that it could ***not*** have obtained non-recourse project financing to build electric generating facilities, because such financing was not available for ***any*** projects in Indonesia during 1998 "due to the rupiah devaluation and political and economic conditions." R.2218.

KBC now contended that FPL Energy ("FPL"), one of the investors in KBC, would have provided the necessary (recourse) financing of $500 million. KBC's testimony was that FPL had to make the further investment or else face write-off of its existing $40 million investment. TSR.3654-3653, 3757, 3742. Unbeknownst to Pertamina and PLN, and undisclosed by KBC and its witnesses, however, is that FPL was party to a political risk insurance policy that would have paid–and in fact did pay—$75 million based on the Decree. *See* Pet. App. 10a.

The final hearing was held on June 19-23, 2000. After receiving post-hearing briefs, the tribunal issued its Final Award on December 18, 2000. Pet. App. 201a. It ruled that Pertamina and PLN breached the contracts; that KBC was entitled to termination of the contracts; that KBC was entitled to lost expenditures damages of $93.1 million plus pre-judg-

ment interest of $18 million; and that KBC was entitled to lost future profits damages of $150 million. Post-judgment interest on the entire award of 4% per annum was ordered effective January 1, 2001. Pet. App. 262a-263a.

Proceedings Below

On February 21, 2001, KBC filed a petition in the district court to confirm the award and to enter judgment against Pertamina and PLN in the full amount of the award, but served only Pertamina and later dismissed PLN. *See* Pet. App. 56a n.1. The district court had jurisdiction under 28 U.S.C. §§ 1330 and 1605(a)(6).

On June 21, KBC filed a motion for summary judgment, arguing principally that Pertamina had waived all defenses. In an opinion and judgment entered on December 4, 2001, the district court granted KBC's motion. Pet. App. 56a. Although holding that Pertamina had not waived its New York Convention defenses to enforcement of the award, Pet. App. 64a-66a, the district court rejected those defenses, Pet. App. 89a-90a. The district court also denied Pertamina's request for discovery pursuant to Fed. R. Civ. P. 56(f) concerning FPL's alleged readiness to finance the project. Pet. App. 79a-82a. Pertamina timely appealed from that judgment.

Following proceedings pursuant to a motion Pertamina filed for relief under Fed. R. Civ. P. 60(b), the Fifth Circuit ruled on March 23, 2004, rejecting Pertamina's challenge to enforcement of the award.[3]

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[3] Pertamina moved under Rule 60(b)(2), based on newly discovered evidence of the insurance policy, and under Rule 60(b)(5), based on a judgment of the Central Jakarta District Court annulling the award. On March 5, 2003, the Fifth Circuit ordered a limited remand for the district court to decide the Rule 60(b) motion. 2003 WL 21027134, Pet. App. 91a-101a. In a multi-step process, the district court thereafter denied the Rule 60(b) motion, Pet. App. 102a-122a, 123a-141a, 142a-143a, and

The court of appeals did not articulate any particular standard of review for its assessment of the propriety of the selection of arbitrators under Article V(1)(d) of the Convention. It began by acknowledging that "[b]y its terms, the arbitration clause covers a dispute between KBC and Pertamina arising under the ESC, as well as a dispute in which the interests of KBC and Pertamina are aligned." Pet. App. 32a. The court rejected application of the agreed selection procedure to the facts of this case, however, because, the court contended, "Pertamina could effectively block arbitration under the ESC simply by refusing to agree with KBC to the selection of an arbitrator," Pet. App. 33a, ignoring that the same arbitration clause mandates resort to ICSID to remedy a failure to appoint an arbitrator, Pet. App. 30a.

Next, and contrary to the tribunal's analysis, the court of appeals implied that Pertamina waived its objection by not participating in the ICSID appointment procedure and by not appointing its own arbitrator before the panel was seated. Pet. App. 33a. Instead, it adopted the district court's view–unsupported by any evidence or any logic–that this was some sort of "strategic decision" and that Pertamina should now be foreclosed from asserting its objection. *Id.* In the end, the court rested its decision on the tribunal having "reasonably

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144a-150a, appeal from which was consolidated with Pertamina's appeal of the underlying judgment. Pet. App. 3a.

KBC had obtained a preliminary injunction prohibiting Pertamina from prosecuting the Jakarta action, as well as a contempt finding based on an antecedent temporary restraining order. In proceedings separate from those that are the subject of this petition, the Fifth Circuit reversed and vacated the preliminary injunction as an abuse of discretion and reversed and vacated the contempt citation as being based on an unlawful injunction. *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357 (5th Cir. 2003). In neither opinion did the court of appeals articulate the standard for determining the parties' choice of the applicable arbitral law.

interpreted the ESC's arbitration provisions and reasonably applied the UNCITRAL arbitration rules," *id.*, without discussing why deference was due or why the parties' written agreement should not be applied strictly.

The court also rejected Pertamina's other challenges to the award and its appeal from the denial of Rule 60(b) relief and affirmed confirmation of the award.

REASONS FOR GRANTING THE PETITION

Arbitration is unquestionably a creature of contract. The scope of the parties' consent defines and limits the arbitrator's power. Parties may not be compelled to arbitrate other than as they have contracted, nor should they abide an arbitral award that results from a procedure for which they have not contracted. *See, e.g., First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995). The New York Convention mandates this result by requiring in Article II a written agreement that defines the scope of consent, which neither courts nor arbitrators are free to disregard. This principle is common to both the Convention and the FAA, and should be enforced here. The court of appeals improperly gave primacy to expediency and deference to the interpretation of the arbitrators on a matter concerning their power, and in so doing created a conflict among the circuits.

Until the Fifth Circuit's decision, it was well accepted that "[a]rbitration awards made by arbitrators not appointed under the method provided in the parties' contract must be vacated," even if the arbitrators or an appointing authority concluded that the selection was permissible. *Cargill Rice, Inc. v. Empresa Nicaraguense Dealimentos Basicos*, 25 F.3d 223, 226 (4th Cir. 1994). This rule was equally understood by the Second, Eighth, and Eleventh Circuits. *See, e.g., Hugs & Kisses, Inc. v. Aguirre*, 220 F.3d 890, 893 (8th Cir. 2000) ("arbitrators are without authority where they are not chosen as provided in the parties' arbitration agreement"); *Szuts v.*

Dean Witter Reynolds, Inc., 931 F.2d 830, 831 (11th Cir. 1991) ("[t]he power and authority of the arbitrators in an arbitration proceeding is dependent on the provisions of the arbitration agreement under which the arbitrators were appointed"); *Avis Rent A Car Sys., Inc. v. Garage Employees Union*, 791 F.2d 22, 25 (2d Cir. 1986) ("Courts generally enforce [arbitration clauses] strictly, vacating awards entered by arbitrators whose qualifications or method of appointment fail to conform to arbitration clauses."). *See also R.J. O'Brien & Assoc. v. Pipkin*, 64 F.3d 257, 263 (7th Cir. 1995) ("in order to enforce an arbitration award, the arbitrator must be chosen in conformance with the procedure specified in the parties' agreement to arbitrate," but finding no violation).

In disregard of the accepted proposition under the FAA that the courts should not defer to the arbitrators' construction of the validity of their appointment when not appointed in strict compliance with the arbitration agreement, the Fifth Circuit here allowed a method of selection under the New York Convention that differed from the one it acknowledged must apply "[b]y its terms" to all disputes, Pet. App. 32a, and did so in deference to the arbitrators' interpretation of the agreement. The Fifth Circuit's decision thus either creates a conflict with all other circuits to have addressed the issue or, sub silentio, it creates a new rule applicable only to cases in which enforcement is challenged under the New York Convention.

This conflict needs to be resolved. International arbitration, including arbitration involving sovereigns and their instrumentalities, has increased to the point of ubiquity. Clear rules are needed to guide the conduct of participants and so that they will know the circumstances under which awards will, and will not, be enforceable in the U.S. This Court has taken a special interest in resolving these sorts of threshold or gateway issues and who gets to decide them. *See, e.g., First Options*, 514 U.S. at 940-41. Based on this Court's precedent,

it is inconceivable that the answer to the question presented here–who decides who gets to decide an arbitrable dispute–is anything other than the court, and by *de novo* review. To establish this important precedent, this Court should grant the petition.

I. THE RULING BELOW IS ERRONEOUS AND CAUSES CONFLICT AMONG THE CIRCUITS CONCERNING RESPECT FOR THE PARTIES' AGREEMENT FOR ARBITRATOR SELECTION.

Under the New York Convention, no less than under the FAA, party consent is paramount, including with respect to the method of selection of arbitrators. *See, e.g., Goldtron Ltd. gevestigd te Singapore v. Media Most B.V.*, Rb., Amsterdam, Aug. 17, 2002, 17 Mealey's Int'l Arb. Rep. 13 (Nov. 2002) (declining enforcement under Art. V(2)(b) of New York Convention for failure to follow agreed-upon arbitration procedure). "After all, the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes . . . , but to ensure that commercial arbitration agreements, like other contracts, 'are enforced according to their terms.'" *First Options*, 514 U.S. at 947 (citations and internal quotations omitted). *See also, e.g., China Minmetals Materials Import & Export Co. v. Chi Mei Corp.*, 334 F.3d 274, 289 (3d Cir. 2003) (protecting party consent is "crucial principle"); *Bridas S.A.P.I.C. v. Government of Turkmenistan*, 345 F.3d 347, 355 (5th Cir. 2003) (consent essential).

The FAA allows courts to decline enforcement of an arbitration award "[w]here the arbitrators exceeded their powers," 9. U.S.C. § 10(a)(4), and on that basis courts have declined enforcement when arbitrators are selected by a method other than that agreed by the parties—in effect the counterpart of the court's power to order "the parties to proceed to arbitration in accordance with the terms of the

agreement," *id.* § 4, and that "[i]f in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed," *id.* § 5. *See, e.g.*, *Hugs & Kisses, Inc.*, 220 F.3d at 893; *Cargill*, 25 F.3d at 225-26.

Chapter 2 of the FAA, which implements the Convention in the United States, 9 U.S.C. § 201, specifies that "Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States." *Id.* § 208. Nothing in Chapter 1 of the FAA concerning selection of arbitrators as agreed by the parties conflicts with the Convention or Chapter 2. The provisions are perfectly symmetrical. Parallel to FAA Sections 4 and 5, New York Convention Art. II directs courts in contracting states to enforce arbitration awards and order parties to arbitration in accordance with them. In fact, the Convention even more emphatically directs that enforcement of an international award may be declined when "[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties," Art. V(1)(d). There was thus no basis for the court of appeals to have deviated from the standard courts have applied under the FAA as to a challenge to selection of the arbitrators.

There is good reason why the other courts of appeals have recognized that the final determination of the parties' agreement as to the method of selection is for the courts, and that the agreement must be strictly enforced according to its terms. The selection method is a quintessential threshold question for the courts—

> the kind of narrow circumstance where contracting parties would likely have expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the

> gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate.

Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83-84 (2002).

First, if the arbitrator has not been appointed in accordance with the parties' agreement, then the appointment is a nullity, and the arbitrator has no power to interpret the contract. The arbitrator's construction of the contract on the issue of his appointment therefore has no particular standing and is not entitled to deference. *See Cargill*, 25 F.3d at 226 (arbitrators could not interpret the contract as to their selection "because the determination of how they should be selected obviously had to precede their selection"); *Avis*, 791 F.2d at 25 ("the arbitrator had no authority to interpret that agreement, because his appointment did not conform to it").

Second, as a matter of statutory construction, Article V(1)(d) identifies failure to abide by the agreement for the composition of the panel as among the grounds for the ***court*** to decline enforcement of the award. If the court is instead to defer to the arbitrator's ***own*** determination, as would be the case if this were a gateway issue for the arbitrator to decide, then it would be virtually impossible for a party to defeat enforcement of the award by vindicating the right to an arbitration conducted in accordance with the contract. Only by allocating the issue to the courts can this clause of the Convention be given real effect. *Cf. First Options*, 514 U.S. at 943 (FAA specifies grounds for court to decline enforcement, and court should decide matters left for court's determination "just as it would decide any other question that the parties did not submit to arbitration, namely, independently").

Third, perhaps more than any other gateway decision, leaving to the tribunal the question of the propriety of the arbitrator's selection risks taint by self-interest, whether

directly, such as through an arbitrator's conscious interest in maintaining an appointment that is likely to produce substantial fees for the arbitrator, or indirectly, such as through an arbitrator's interest in dealing with a complex or challenging legal or factual scenario or in enhancing his or her reputation through association with a high profile matter. The issue is not whether such self-interest is present in this case, but whether, in the face of the predictable risk of such self-interest, parties to an arbitration agreement should be understood to have expected the matter to be resolved primarily by the arbitrators. Put somewhat differently, if parties to arbitration agreements were to consider the matter at the time of contracting, they would not expect the arbitrators to be the judge of whether they were hired properly and entitled to hear a case that was otherwise admittedly subject to arbitration. *Cf. Int'l Ass'n of Machinists & Aerospace Workers v. General Electric Co.*, 865 F.2d 902, 904 (7th Cir. 1989) ("arbitrator is not the judge of his own authority").

Thus the only way for a court to give effect to the Convention's provision as well as the parties' agreement is for the court independently to construe the contract. Moreover, it is well accepted that in doing so, the court should read the agreement strictly. *See, e.g., Avis*, 791 F.2d at 25 ("Courts generally enforce such clauses strictly, vacating awards entered by arbitrators whose qualifications or method of appointment fail to conform to arbitration clauses.").

The court of appeals here confounded all of these principles. Its principal mode of analysis was to assess the reasonableness of the arbitrators' interpretation of the arbitration agreements, rather than to apply strictly the terms of those agreements. And the procedure it approved plainly abrogated the terms of the agreements—Pertamina was neither allowed to select its own arbitrator as provided in the JOC nor allowed to select an arbitrator with KBC as provided by the ESC, but

instead was forced to share an arbitrator with PLN and the Government, which was not prescribed by the JOC or the ESC. The court's ostensible basis for favoring this arrangement—the assumption that Pertamina could block an arbitration KBC desired under the ESC by failing to agree on an arbitrator–was based on a fundamental misunderstanding of the agreement, since the agreement plainly provided a remedy in that situation, namely resort to the ICSID Secretary General to select a joint arbitrator for KBC and Pertamina, the two parties the ESC explicitly stated should share an arbitrator. It was not open to KBC to concoct a hybrid version rather than use the methods prescribed in the parties' agreements, as many other cases make clear. *See, e.g., Hugs & Kisses, Inc.*, 220 F.3d at 893 ("Hugs & Kisses' proper course was to attempt to reach agreement with appellants as to the arbitrator, and, that failing, to move the district court to compel arbitration" under the FAA); *Szuts*, 931 F.2d at 831 (two arbitrators could not proceed alone when agreement provided for arbitration "before at least three arbitrators"); *Encyclopedia Universalis, S.A. v. Encyclopedia Britannica, Inc.*, 2003 WL 22881820 at *5, *8-10 (S.D.N.Y. Dec. 4, 2003) (party improperly obtained third arbitrator via appointing authority without first trying to reach agreement with other party, as provided in agreement).

And the Fifth Circuit's reference to and perhaps reliance on concepts of waiver was just wrong, as even the arbitrators understood, *supra* p. 10, and violated the Fifth Circuit's own precedent in this regard. In *Brook v. Peak Int'l, Ltd.*, 294 F.3d 668, 673 (5th Cir. 2002), Brook, the party challenging the award, never objected to the plain defect in the selection procedure "until prompted by the federal magistrate judge long after the arbitration had run its course." In contrast, Pertamina (along with PLN and the Government) challenged the method of selection of the arbitrators at the very start of the arbitration, and the challenge was among the subjects of the preliminary proceedings, just as Fifth Circuit precedent

provided. *See id.* at 674 ("This court has previously held that objections to the composition of arbitration panels must be raised 'at the time of the hearing.'") (citation omitted). In *Brook*, the court of appeals explained that "[w]e do not hold that Brook had to exhaust all of the described avenues of objecting to the arbitrator selection process, but . . . he had to make plain and timely his exact objection so that a responsible party—whether the AAA or the arbitrator or a federal court could have enforced" the arbitration agreement. *Id.* Pertamina did just that and was entitled to have arbitrators selected in accordance with its agreements. *See First Options*, 514 U.S. at 946 ("insofar as the Kaplans were forcefully objecting to the arbitrators deciding their dispute with First Options, one naturally would think that they did ***not*** want the arbitrators to have binding authority over them"); *Avis*, 791 F.2d at 26 ("Avis's protest to the Mediation Board that only the AAA procedures were appropriate was clear. We cannot say that Avis was required to do more to preserve its objections.").[4] The court's assertion that Pertamina's conduct was strategic–in the sense of gaming the system–has no support and is illogical. No strategic advantage could be gained by failing to take the opportunity to appoint one's own arbitrator if it in fact existed, but Pertamina, of course, could not have appointed its own arbitrator because the procedure KBC adopted, and the tribunal and courts sanctioned,

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[4] The court noted that the record before it did not contain Pertamina's letter of July 27, 1998, in which Pertamina informed ICSID that it had not received the ICSID letters of June 11 and 23 and July 2 concerning the appointment of Mr. El-Khosheri on behalf of Pertamina, PLN, and the Government, and its objection to the procedure, Pet. App. 33a n.63, but the tribunal made a specific factual finding on that point, Pet. App. 161a, and the court was not free to disregard such findings of fact. "Absent extraordinary circumstances, a confirming court is not to reconsider the arbitrator's findings." *Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 315 (2d Cir. 1998).

required that Pertamina appoint an arbitrator jointly with PLN and the Government, or not at all.

Finally, that the parties had provided for the use of the UNCITRAL Arbitration Rules provides no basis to ignore the parties' agreement. To the contrary, those rules themselves provide that disputes subject to them "shall be settled in accordance with these Rules ***subject to such modification as the parties may agree in writing.***" UNCITRAL Arbitration Rule 1(1) (emphasis added). As the Eleventh Circuit explained, "because arbitration is a creature of contract, . . . the specific provisions in the arbitration agreement take precedence." *Szuts*, 931 F.2d at 831-32.

II. IT IS IMPORTANT TO BRING CERTAINTY TO THIS AREA OF THE LAW, AND THIS CASE PRESENTS A SUITABLE VEHICLE BY WHICH TO DO SO.

Since its observations concerning the New York Convention 30 years ago in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974), this Court has not taken the opportunity to interpret and implement the Convention and to articulate its interaction with the FAA, other than to make clear that U.S. courts should be respectful of and enforce agreements in international commerce to arbitrate. *See Mitsubishi Motors v. Soler Chrysler-Plymouth*, 473 U.S. 614, 631-39 (1985). Experience in the lower courts is at a point where this Court's involvement would serve the interests of certainty and consistency that were the objectives of U.S. accession to the Convention, and this case provides an appropriate vehicle to do so.

The Court has recognized over the last several years the importance of resolving the allocation of responsibility as between the courts and arbitrators for deciding varying types of threshold or gateway issues. *See, e.g., Green Tree Financial Corp. v. Bazzle*, 123 S. Ct. 2402 (2003) (arbitrators

should decide whether arbitration agreements permit class arbitration); *Howsam*, 537 U.S. at 84-85 (arbitrators to decide applicability of NASD time limitation rule); *First Options*, 514 U.S. at 944-45 (courts to decide whether arbitration agreement bound non-signatory). The question whether courts or arbitrators should have primary responsibility for determining whether the arbitrators were selected in accordance with the parties' agreement is equally important, recurring, and in need of clarification. Like the question of arbitrability, it concerns fundamentally ***who*** will decide the parties' dispute, and, unlike the question in *Green Tree*, not merely "what ***kind of arbitration proceeding*** the parties agreed to." 123 S. Ct. at 2407 (emphasis in original). And for reasons discussed above, that is a question the parties should be assumed to have expected the courts to resolve.

Moreover, the exercise of this Court's supervisory powers is appropriate to ensure uniform and consistent application of the New York Convention throughout the United States. The Convention entails reciprocal obligations among nations, and U.S. courts must enforce them carefully and even-handedly to ensure that U.S. nationals will receive fair treatment under the Convention in the territory of other signatories. *See Beiser v. Weyler*, 284 F.3d 665, 672 (5th Cir. 2002). When the "pro-enforcement bias" on which the court below relied causes courts to lose sight of the residual control function they are expected to play under the Convention, it disserves both arbitration's legitimacy and parties who depend on the courts to ensure that they get the arbitration for which they contracted. Violation of the agreed-upon arbitrator selection method "may transform a fair and efficient adjudicative proceeding into a sham trial . . . [and] destroy the legitimacy of the entire arbitration proceeding." *Encyclopedia Universalis*, 2003 WL 22881820 at *1.

This is also an important case in which to address and resolve the issue. Of the amount awarded—now approaching

$300 million, including interest—more than half represents assumed lost future profits from the sale of electricity from generating facilities that were never begun to be built and for which no financing was ever committed. In another arbitration award emerging from the same economic crisis in Indonesia, the arbitrators observed that awarding lost future profits for capacity that has not yet been built would be grossly inequitable–"like stepping on the shoulders of a drowning man." R.1399. For such an inequitable award to have been issued by an arbitration tribunal that was not selected in accordance with the parties' agreement only compounds the deep sense of injustice. And where the project suspension that underlies the award was imposed by the IMF at the insistence of the U.S. government, there is an added responsibility for U.S. courts to ensure that the proceedings by which the award was rendered fully satisfy New York Convention standards.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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June 21, 2004

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 02-20042, 03-20602

KARAHA BODAS CO., L.L.C.,
Plaintiff-Appellee,

v.

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA; *et al.*,
Defendants,

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA,
Defendant-Appellant.

March 23, 2004.

Before KING, *Chief Circuit Judge*, DAVIS, Circuit Judge, and ROSENTHAL,* District Judge.

ROSENTHAL, *District Judge*:

Thirty years ago, the United States Supreme Court recognized that "[a] contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. . . . Such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the

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* District Judge of the Southern District of Texas, sitting by designation.

parties or unfamiliar with the problem area involved."[1] When, as here, parties to international commercial contracts agree to arbitrate future disputes in a neutral forum, orderliness and predictability also depend on the procedures for reviewing and enforcing arbitral awards that may result. This appeal arises from an arbitral award (the "Award") made in Geneva, Switzerland, involving contracts negotiated and allegedly breached in Indonesia. The Award imposed liability and damages against Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina"), which is owned by the government of Indonesia, in favor of Karaha Bodas Company, L.L.C. ("KBC"), a Cayman Islands company. KBC filed this suit in the federal district court in Texas to enforce the Award under the United National [sic] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), and filed enforcement actions in Hong Kong and Canada as well.[2] While those enforcement proceedings were pending, Pertamina appealed the Award in the Swiss courts, seeking annulment. When that effort failed, and after the Texas district court granted summary judgment enforcing the Award, Pertamina obtained an order from an Indonesian court annulling the Award.[3]

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[1] *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974).

[2] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (entered into force with respect to the United States, Dec. 29, 1970), *codified at* 9 U.S.C. § 201 *et seq.*

[3] A different panel of this court heard a separate appeal from the district court's injunction against Pertamina's prosecution of the action in Indonesia, but did not decide the effect of the Indonesian court's annulment order on the enforcement proceeding. *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 335 F.3d 357, 373- 74 (5th Cir.2003). One of the issues before this panel is whether the Indonesian court's order is a defense to the enforcement of the Award.

Pertamina appealed to this court. During the appeal, Pertamina filed in the district court a motion to set aside the judgment under Federal Rule of Civil Procedure 60(b)(2), based on newly-discovered evidence Pertamina contended should have been disclosed during the arbitration, and under Rule 60(b)(5), based on the Indonesian court's decision annulling the arbitration Award. This court remanded to the district court for consideration of Pertamina's Rule 60(b) motion.[4] On remand, the district court denied Pertamina's Rule 60(b) motion. This appeal consolidates Pertamina's challenges to the grant of summary judgment and to the denial of the Rule 60(b) motion.

Pertamina urges this court to reverse the district court's decision enforcing the Award on several grounds under the New York Convention. We conclude that the record forecloses Pertamina's arguments that procedural violations and other errors occurred during the arbitration preclude enforcement. We reject Pertamina's argument that the Indonesian court's order annulling the Award bars its enforcement under the New York Convention; this argument is inconsistent with the arbitration agreements Pertamina signed and with its earlier position that Switzerland, the neutral forum the parties selected, had exclusive jurisdiction over an annulment proceeding. We reject Pertamina's efforts to delay or avoid enforcement of the Award as evidencing a disregard for the international commercial arbitration procedures it agreed to follow.[5] In short, we affirm the district court's judgment enforcing the Award, for the reasons set out in detail below.

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[4] *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 2003 WL 21027134, at *4-6 (5th Cir. March 5, 2003).

[5] We note that the length of this opinion reflects the number of arguments Pertamina raises to evade its obligations under the Award more than the strength of those arguments.

I. Background

A. Procedural and Factual History

KBC explores and develops geothermal energy sources and builds electric generating stations using geothermal sources. Pertamina is an oil, gas, and geothermal energy company owned by the Republic of Indonesia.[6] In November 1994, KBC signed two contracts to produce electricity from geothermal sources in Indonesia. Under the Joint Operation Contract ("JOC"), KBC had the right to develop geothermal energy sources in the Karaha area of Indonesia; Pertamina was to manage the project and receive the electricity generated. Under the Energy Sales Contract ("ESC"), PLN agreed to purchase from Pertamina the energy generated by KBC's facilities. Both contracts contained almost identical broad arbitration clauses, requiring the parties to arbitrate any disputes in Geneva, Switzerland under the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL").[7]

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[6] PLN, an electric utility owned by the government of Indonesia, was a party to the arbitration but was dismissed from the district court action.

[7] Article 13.2(a) of the arbitration provision of the JOC provided:

> If the Dispute cannot be settled within thirty (30) working days by mutual discussions as contemplated by Article 13.1 hereof, the Dispute shall finally be settled by an arbitral tribunal (the "Tribunal") under the UNCITRAL arbitration rules. . . . Each Party will appoint an arbitrator within thirty (30) days after the date of a request to initiate arbitration, who will then jointly appoint a third arbitrator within thirty (30) days of the date of the appointment of the second arbitrator, to act as Chairman of the Tribunal. Arbitrators not appointed within the time limits set forth in the preceding sentence shall be appointed by the Secretary General of the International Center for Settlement of Investment Disputes. Both Parties undertake to implement the arbitration award. The site of the arbitration shall be Geneva, Switzerland. The language of the

On September 20, 1997, the government of Indonesia temporarily suspended the project because of the country's

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> arbitration shall be English. The Parties expressly agree to waive [certain Indonesian procedural laws]. . . .

JOC, Art. 13.2(a),(d). Section 8.2(a) of the ESC's arbitration provision similarly read:

> If the Dispute cannot be settled within forty-five calendar (45) days by mutual discussions as contemplated by Section 8.1 hereof, the Dispute shall finally be settled by an arbitral tribunal (the "Tribunal") under the UNCITRAL arbitration rules. . . . PLN on one hand, and [KBC] and PERTAMINA on the other hand, will each appoint one arbitrator, in each case within thirty (30) days after the date of a request to initiate arbitration, who will then jointly appoint a third arbitrator within thirty (30) days of the date of the appointment of the second arbitrator, to act as Chairman of the Tribunal. Arbitrators not appointed within the time limits set forth in the preceding sentence shall be appointed by the Secretary General of the International Center for Settlement of Investment Disputes, upon the request of any Party. All Parties undertake to implement the arbitration award. The site of the arbitration shall be Geneva, Switzerland. The language of the arbitration shall be English. The Parties expressly agree to waive the applicability of [certain Indonesian procedural laws]. . . .

Both contracts contained the following additional arbitration language:

> The award rendered in any arbitration commenced hereunder shall be final and binding upon the Parties and judgment thereon may be entered in any court having jurisdiction for its enforcement. The Parties hereby renounce their right to appeal from the decision of the arbitral panel and agree that in accordance with Section 641 of the Indonesian Code of Civil Procedure [neither] Party shall appeal to any court from the decision of the arbitral panel and accordingly the Parties hereby waive the applicability of [certain Indonesian laws]. In addition, the Parties agree that [neither] Party shall have any right to commence or maintain any suit or legal proceeding concerning a [dispute hereunder until the] dispute has been determined in accordance with the arbitration procedure provided for herein and then only to enforce or facilitate the execution of the award rendered in such arbitration.

JOC, Art. 13.2(d); ESC, § 8.2(d).

financial crisis. The government of Indonesia indefinitely suspended the project on January 10, 1998. On February 10, 1998, KBC notified Pertamina and PLN that the government's indefinite suspension constituted an event of "force majeure" under the contracts. KBC initiated arbitration proceedings on April 30, 1998. In its notice of arbitration, KBC appointed Professor Piero Bernardini, vice- chair of the International Chamber of Commerce's ("ICC") International Court of Arbitration and member of the London Court of International Arbitration, to serve as an arbitrator. Pertamina, however, did not designate an arbitrator in the contractually allotted thirty days. The JOC and ESC both provided that if a party failed to appoint an arbitrator within thirty days, the Secretary- General of the International Center for Settlement of Investment Disputes ("ICSID") was to make the appointment. After notifying Pertamina, PLN, and the government of Indonesia, the ICSID appointed Dr. Ahmed El-Kosheri, another vice-chair of the ICC, as the second arbitrator. As specified in the JOC and ESC, the two appointed arbitrators then selected the chairman of the arbitration panel, Yves Derains, the former Secretary-General of the ICC.

Pertamina raised threshold challenges to the Tribunal's consolidation of the claims KBC raised under the JOC and the ESC into one arbitration proceeding and to the selection of the panel. In October 1999, the Tribunal issued a Preliminary Award, rejecting Pertamina's threshold challenges and ruling that the government of Indonesia was not a party to the contracts or to the arbitration proceeding.

KBC filed its Revised Statement of Claim in November 1999. Pertamina received a number of extensions before it filed its reply to the Revised Statement of Claim in April 2000. KBC filed a rebuttal to that reply in May 2000. In response to KBC's rebuttal, Pertamina sought additional discovery and a continuance of the proceedings, claiming that

KBC had raised assertions and added elements to its case-in-chief not contained in the Revised Statement of Claim.

From the outset, the parties vigorously disputed whether KBC could have obtained financing to build the project if the government of Indonesia had not issued the suspension decree. Pertamina contended that KBC could not have built the project—and therefore suffered no damages from the government decree suspending the work—because the precarious situation in Indonesia effectively made the necessary financing unavailable. Pertamina asserted that KBC's rebuttal introduced a new theory as to how project financing could have been obtained. KBC changed from focusing on the availability of third-party financing and argued in the rebuttal that one of its direct investors, FPL Energy ("FPL"), would have provided project financing if no other source was available. Shortly before the scheduled hearing, Pertamina sought discovery of documents relating to FPL's asserted willingness to finance the project. In May 2000, the Tribunal denied Pertamina's request to obtain this discovery before the hearing and denied the request for a continuance. The Tribunal stated that it would decide at the conclusion of the hearing "whether any adjustment to the proceeding" would be required because of the discovery requested. The hearing on the merits proceeded as scheduled in June 2000.

The Tribunal received a large record. Both sides submitted extensive witness statements, expert reports, exhibits, and briefs. During the hearing, Pertamina and PLN cross-examined KBC's witnesses, including two witnesses who testified about KBC's ability to finance the project, Robert McGrath, Treasurer of FPL Group, Inc., and Leslie Gelber, former Vice-President of Development at FPL Energy. Both witnesses submitted declarations stating that "FPL Energy was prepared in 1998 to provide bridge financing or direct capital to continue the Project through the phases of the Project that were scheduled to be completed during Indo-

nesia's period of instability." At the hearing, counsel for Pertamina specifically questioned McGrath about the availability of project financing from FPL. During that questioning, a Tribunal member asked McGrath whether the investment in the project was protected by a form of political risk insurance. McGrath responded, "I am not sure of that. I know there were some discussions at the time, but I don't recollect as to whether it was or wasn't." Counsel for Pertamina asked no follow-up questions. At the end of the hearing, counsel for Pertamina declined to pursue the previously requested discovery and stated that the record had been "fully" made.

In the Final Award, the Tribunal found that under the JOC and the ESC, Pertamina and PLN had accepted the risk of loss arising from a "Government Related Event." The Tribunal interpreted the contracts as "putting the consequences of a Governmental decision which prevents the performance of the contract at Pertamina's . . . sole risk." The Tribunal awarded KBC $111.1 million, the amount KBC had expended on the project, and $150 million in lost profits. The Tribunal explained in detail why it rejected the lost profits amount KBC sought–$512.5 million–and how it arrived at the amount awarded.

In February 2001, Pertamina appealed the Award to the Supreme Court of Switzerland. While that appeal was pending, KBC initiated this suit in the federal district court to enforce the Award.

B. The District Court Decisions

Pertamina challenged enforcement of the Award in the federal district court on four grounds under Article V of the New York Convention: (1) the procedure for selecting the arbitrators was not in accordance with the agreement of the parties; (2) the Tribunal improperly consolidated the claims into one arbitration; (3) Pertamina was "unable to present its

case" to the Tribunal; and (4) enforcement of the damages Award would violate the public policy of the United States. As to the first two grounds, Pertamina contended that the decision to consolidate the claims under the two contracts was procedurally improper and that KBC's unilateral appointment of an arbitrator violated the ESC arbitration provision. As to the third ground, Pertamina argued that the Tribunal improperly reversed its finding in the Preliminary Award that Pertamina did not breach the contracts by holding Pertamina liable for nonperformance in the Final Award; that the Tribunal's denial of Pertamina's request for discovery of FPL's records prevented Pertamina from fully presenting its case; and that the Tribunal's denial of a continuance after KBC filed its rebuttal to the reply to the Revised Statement of Claim prevented Pertamina from fully preparing to meet KBC's contentions. As to the fourth ground, Pertamina argued that the Award violated the international abuse of rights doctrine and punished Pertamina for obeying the Indonesian government's decree. Under Federal Rule of Civil Procedure 56(f), Pertamina requested a delay in the district court in responding to KBC's summary judgment motion to seek discovery of the same FPL records it had unsuccessfully sought in the arbitration.

Pertamina continued its appeal seeking annulment of the Award to the Supreme Court of Switzerland while the enforcement action was pending in the district court in Texas. The Texas district court slowed the proceedings in deference to Pertamina's request that the Swiss court first be allowed to decide whether to annul the Award. In April 2001, the Swiss Supreme Court dismissed Pertamina's claim because of untimely payment of costs. Pertamina moved for reconsideration; the Swiss court denied that motion in August 2001.

In December 2001, the district court enforced the Award, rejecting each of Pertamina's grounds for refusal. The district court carefully reviewed the record in examining Pertamina's

claimed inability to challenge in the arbitration proceeding KBC's argument that it could have obtained project financing from its investor, FPL. The district court denied Pertamina's Rule 56(f) request for additional discovery on this issue. Pertamina filed its notice of appeal from the district court's summary judgment enforcing the Award in January 2002.

Having failed in its effort to annul the Award in the Swiss courts, Pertamina filed suit in Indonesia seeking annulment. In August 2002, an Indonesian court annulled the Award. KBC continued with enforcement suits in Hong Kong and Canada. In October 2002, while this appeal was pending, Pertamina discovered in the Canadian proceeding that FPL and one other KBC investor, Caithness, had held a political risk insurance policy covering the KBC project through Lloyd's of London. Pertamina also learned that Lloyd's had paid $75 million under that insurance policy to FPL and Caithness for the losses resulting from the Indonesian government's suspension of the project.

In December 2002, Pertamina filed a motion in the district court to vacate the judgment on three grounds: (1) newly-discovered evidence of the political risk insurance policy, under Rule 60(b)(2); (2) the Indonesian court's annulment of the underlying arbitral Award, under Rule 60(b)(5); and (3) satisfaction of judgment to the extent of the $75 million insurance payment. Pertamina also filed a motion in this court to supplement the record and briefing. In both motions, Pertamina argued that the existence of political risk insurance coverage in favor of FPL undermined KBC's claims that the contracts allocated political risks to Pertamina and that FPL would have financed the project in order to avoid losing its earlier investment. Additionally, Pertamina argued that the payment of the insurance proceeds undermined the Tribunal's determination of damages. Pertamina urged that KBC's

failure to disclose the insurance during the arbitration provided a basis for refusing to enforce the Award and made the district court's summary judgment improper.

This court denied Pertamina's motion to supplement the appellate record under Federal Rule of Appellate Procedure 10(e) and remanded to the district court for consideration of Pertamina's Rule 60(b) motion. On remand, the district court denied the motion, finding that Pertamina failed to show that KBC had misled the tribunal or that KBC's failure to produce the political risk insurance policy violated the rules governing the arbitration.

The district court also rejected Pertamina's claim that Indonesia had primary jurisdiction to decide to annul the Award and declined to give effect to the Indonesian court's annulment order as a defense to enforcement. The district court imposed judicial estoppel to preclude Pertamina from asserting that Indonesian procedural law had governed the arbitration and that Indonesian courts had primary jurisdiction to review the Award. Finally, the district court rejected Pertamina's argument that the amount of the Award should be offset by the $75 million insurance payment.[8]

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[8] The day after the district court issued its final order denying Pertamina's Rule 60(b) motion, KBC submitted a letter to the court "clarifying" that while FPL was not the insured under the political risk insurance policy, FPL owned one of the named insureds that benefitted under the policy. The district court issued a supplemental order acknowledging KBC's letter and noting that the fact that FPL was not a named insured under the insurance policy "was only one of many factors that the Court considered in denying Pertamina's Rule 60(b) Motion. Thus, the fact that an entity owned by FPL, but not FPL itself, benefit[t]ed under the policy does not change any legal conclusion" in the court's decision. On the same day that the district court issued its supplemental order, and ten days after the court's denial of Pertamina's Rule 60(b) motion, KBC filed a Motion to Amend Findings of Fact under Federal Rule of Civil Procedure 52(b). In a second supplemental order, the district court recognized KBC's motion as a Motion to Amend or Alter Judgment under

This appeal followed. Pertamina argues that the Tribunal improperly consolidated the claims into one arbitration proceeding; the selection of the arbitrators violated the JOC and ESC; the Tribunal denied Pertamina a fair opportunity to present its case because the Tribunal reversed part of its Preliminary Award without notice, denied Pertamina's request to postpone the arbitration, and denied Pertamina's discovery requests; the Award is contrary to public policy because it violated the international law abuse of rights doctrine and because the district court's decision holds Pertamina liable for complying with Indonesian law; and the Indonesian court's annulment of the arbitral Award is a defense to enforcement under the New York Convention. Each ground is addressed below.

II. Analysis

A district court's decision confirming an arbitration award is reviewed under the same standard as any other district court decision.[9] This court reviews a district court's grant of summary judgment *de novo*.[10]

A. The New York Convention

The New York Convention provides a carefully structured framework for the review and enforcement of international arbitral awards. Only a court in a country with primary

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Federal Rule of Civil Procedure 59(e) and granted the motion. The court assumed, without deciding, that FPL benefitted from the risk insurance policy, but held that it did not affect the basis of the court's decision. Pertamina argues that the district court did not have jurisdiction to issue either of these two supplemental orders. This court agrees that the issue addressed in the supplemental orders does not affect the outcome of this case.

[9] *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947- 948, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995); *Hughes Training, Inc. v. Cook*, 254 F.3d 588, 592 (5th Cir. 2001).

[10] *Eason v. Thaler*, 73 F.3d 1322, 1324 (5th Cir. 1996).

jurisdiction over an arbitral award may annul that award.[11] Courts in other countries have secondary jurisdiction; a court in a country with secondary jurisdiction is limited to deciding whether the award may be enforced in that country.[12] The Convention "mandates very different regimes for the review of arbitral awards (1) in the [countries] in which, or under the law of which, the award was made, and (2) in other [countries] where recognition and enforcement are sought."[13] Under the Convention, "the country in which, or under the [arbitration] law of which, [an] award was made" is said to have primary jurisdiction over the arbitration award.[14] All other signatory states are secondary jurisdictions, in which parties can only contest whether that state should enforce the arbitral award.[15] It is clear that the district court had secondary jurisdiction and considered only whether to enforce the Award in the United States.

Article V enumerates specific grounds on which a court with secondary jurisdiction may refuse enforcement.[16] In

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[11] *Karaha Bodas Co.*, 335 F.3d at 364; *see Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997).

[12] *Karaha Bodas Co.*, 335 F.3d at 364.

[13] *Alghanim*, 126 F.3d at 23 (quoted in *Karaha Bodas Co.*, 335 F.3d at 364).

[14] *Karaha Bodas Co.*, 335 F.3d at 364.

[15] *Id.*

[16] Article V, Section 201 of the New York Convention provides:

> *1.* Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
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> *(a)* The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

contrast to the limited authority of secondary-jurisdiction courts to review an arbitral award, courts of primary jurisdiction, usually the courts of the country of the arbitral situs, have much broader discretion to set aside an award. While courts of a primary jurisdiction country may apply their own domestic law in evaluating a request to annul or set aside an arbitral award, courts in countries of secondary

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> *(b)* The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
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> *(c)* The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
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> *(d)* The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
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> *(e)* The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
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> 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
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> *(a)* The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
>
> *(b)* The recognition or enforcement of the award would be contrary to the public policy of that country.

9 U.S.C. § 201, Art. V(1)-(2). *See generally Alghanim*, 126 F.3d at 23; Susan Choi, *Judicial Enforcement of Arbitration Awards Under the ICSID and New York Conventions*, 28 N.Y.U. J. Int'l L. & Pol. 175 (1996).

jurisdiction may refuse enforcement only on the grounds specified in Article V.[17]

The New York Convention and the implementing legislation, Chapter 2 of the Federal Arbitration Act ("FAA"), provide that a secondary jurisdiction court must enforce an arbitration award unless it finds one of the grounds for refusal or deferral of recognition or enforcement specified in the Convention.[18] The court may not refuse to enforce an arbitral award solely on the ground that the arbitrator may have made a mistake of law or fact.[19] "Absent extraordinary circumstances, a confirming court is not to reconsider an arbitrator's findings."[20] The party defending against enforcement of the arbitral award bears the burden of proof.[21] Defenses to enforcement under the New York Convention are construed narrowly, "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts. . . ."[22]

B. The Choice-of-Law Issues

In the JOC and ESC, the parties stipulated that "the site of the arbitration shall be Geneva." The Tribunal concluded that under the arbitration agreements, Swiss procedural law ap-

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[17] *Alghanim*, 126 F.3d at 23 (cited in *Karaha Bodas Co.*, 335 F.3d at 368).

[18] 9 U.S.C. § 207.

[19] *Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 315 (2d Cir. 1998); *Nat'l Wrecking Co. v. Int'l Bhd. of Teamsters*, 990 F.2d 957, 960 (7th Cir. 1993).

[20] *Europcar Italia*, 156 F.3d at 315.

[21] *Imperial Ethiopian Gov't v. Baruch-Foster Corp.*, 535 F.2d 334, 336 (5th Cir. 1976); *see Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286, 1292 n. 3 (11th Cir. 2004).

[22] *Imperial Ethiopian Gov't*, 535 F.2d at 335; *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie du Papier*, 508 F.2d 969, 974, 976 (2d Cir. 1974).

plied as the law of the arbitral forum.[23] From 1998 to April 2002, Pertamina consistently and repeatedly took the position before the Tribunal, the Swiss courts, and the United States district court, that Swiss procedural law applied to the arbitration.[24] In April 2002, after the Swiss court had rejected

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[23] The Tribunal specifically cited Swiss procedural law in its Preliminary Award. The Tribunal first cited Swiss law regarding the intentions of parties to a contract to help guide its determination whether the government of Indonesia was a party to the JOC and ESC. The Tribunal cited the Swiss concept of "connexity" in concluding that KBC could consolidate its claims under the contracts into a single arbitration proceeding. Finally, the Tribunal referred to Swiss common law suggesting that arbitrators are not agents in determining that the selection of Tribunal arbitrators was appropriate under the agreements. The Final Award stated that it was "[m]ade in Geneva."

[24] *See, e.g.*, Prelim. Award, § B(1) ("The Respondents support this conclusion by making reference to Swiss law as the JOC and the ESC provide for UNCITRAL Arbitration in Geneva between the parties which are neither Swiss nor Swiss resident. As a result, and under both contracts, the arbitration proceedings are governed by Chapter 12 of the Swiss Private International Law Statutes. Under Swiss law, [Respondent contends] the Arbitral Tribunal is lacking jurisdiction because KBC failed to comply with the contractual prerequisites to arbitration."); *id.* at § C(1) ("The Respondents also state that, under the arbitration agreements and Swiss law, the arbitrators have no power to consolidate . . . ."); *id.* at § C(3) (citing a Swiss federal tribunal case in support of its decision that a consolidated arbitration was appropriate); *id.* at § D(1) (Respondents contend that "[s]uch solution is not acceptable under the applicable Swiss law").

The district court found that Pertamina "specifically, repeatedly and unequivocally" argued that Swiss arbitration law applied in the arbitration. Pertamina opened its motion to stay the district court proceedings pending appeal to the Swiss judiciary by stating: "The arbitration award . . . was conducted subject to the arbitration laws of Switzerland, and the Swiss court is empowered to vacate an award rendered in Switzerland. . . . KBC is asking this Court to act prematurely to confirm an award that might be overturned in the country whose law governed the arbitration." Pertamina added that "it is fundamental that the courts of the originating [n]ation are in the best position to pass on issues under their own law. . . .

Pertamina's annulment proceeding and the district court had held the Award enforceable in the United States, Pertamina moved in the district court for a stay of the Award pending the outcome of the annulment proceeding Pertamina had filed in Indonesia. For the first time, Pertamina raised in the district court the argument that Indonesian, not Swiss, procedural law had applied to the arbitration. Pertamina took this position in the district court as part of its argument that Indonesia had primary jurisdiction over the Award and therefore had the authority to set it aside rather than merely decline to enforce it.

Article V(1)(e) of the Convention provides that a court of secondary jurisdiction may refuse to enforce an arbitral award if it "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."[25] Courts have held that the language, " 'the competent authority of the country ... under the law of which, that award was made' refers exclusively to procedural and not substantive law, and more precisely, to the regimen or scheme of arbitral procedural law under which the arbitration was conducted, and not the substantive law . . . applied in the case."[26] In this appeal, Pertamina and the Republic of Indonesia (the "Republic"), as amicus, argue that the Tribunal and the district court erred in finding that Swiss procedural law, rather than Indonesian procedural law, applied. Pertamina and the Republic argue that in the arbitration agreements, the parties chose Indonesian procedural, as well

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Here, Pertamina's appeal encompasses questions of Swiss law." Pertamina made similar arguments under Swiss procedural law in its responses to KBC's motion for summary judgment.

[25] 9 U.S.C. § 201, Art. V(1)(e).

[26] *Int'l Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera, Indus. Y Comercial*, 745 F. Supp. 172, 178 (S.D.N.Y. 1990); *see Alghanim*, 126 F.3d at 21; *M & C Corp. v. Erwin Behr GmbH & Co., KG*, 87 F.3d 844, 848 (6th Cir. 1996).

as substantive, law to govern the arbitration. Pertamina and the Republic assert that, as a result: (1) the arbitration must be examined for compliance with Indonesian procedural law; and (2) the Indonesian court had primary jurisdiction to annul the Award, providing a defense to enforcement in the United States. KBC responds that the Tribunal properly interpreted the parties' contracts in deciding that Swiss procedural law applied and the district court properly applied the New York Convention in affirming that decision. This court agrees with KBC.

Under the New York Convention, the rulings of the Tribunal interpreting the parties' contract are entitled to deference.[27] Unless the Tribunal manifestly disregarded the parties' agreement or the law, there is no basis to set aside the determination that Swiss procedural law applied.[28] The parties' arbitration agreements specified that the site of the arbitration was Geneva, Switzerland and that the arbitration would proceed under the UNCITRAL rules. Those rules specify that the "arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute."[29] It is undisputed that the parties specified that Indonesian substantive law would apply.[30] It is also undisputed that the contracts specified the site of the arbitration as

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[27] *Europcar Italia,* 156 F.3d at 315; *Nat'l Wrecking Co.,* 990 F.2d at 960; *see James Ford Inc. v. Ford Dealer Computer Serv. Inc.,* 56 Fed. Appx. 324, 325 (9th Cir. 2003) (giving broad deference to an arbitrator's choice-of-law decision).

[28] *Europcar Italia,* 156 F.3d at 315; *Nat'l Wrecking Co.,* 990 F.2d at 960.

[29] *UNCITRAL Arbitration Rules,* G.A. Res. 31/98, U.N. GAOR Comm'n Int'l Trade L., at Art. 33(1) (1976), http://www.uncitral.org/english/texts/arbitration/arb-rules.htm.

[30] Article 20 of the JOC and Section 12.1 of the ESC each provided: "This Contract shall be governed by the laws and regulations of [the] Republic of Indonesia."

Switzerland. The contracts did not otherwise expressly identify the procedural law that would apply to the arbitration. The parties did refer to certain Indonesian Civil Procedure Rules in the contracts.[31] Pertamina and the Republic argue that these references evidence an intent that while Switzerland would be the place of the arbitration, Indonesian procedural law would apply as the *lex arbitri*.

Under the New York Convention, an agreement specifying the place of the arbitration creates a presumption that the

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[31] Pertamina and the Republic rely on the following contractual provisions for their position:

> The parties expressly agree to waive the applicability of (a) Article 650.2 of the Indonesian Code of Civil Procedure so that the appointment of the arbitrators shall not terminate as of the sixth (6th) Month after the date(s) of their appointments and (b) the second sentence of Article 620.1 of the Indonesian Code of Civil Procedure so that the arbitration need not be completed within the specific time.

JOC at Art. 13.2(a); ESC at § 8.2(a).

> In accordance with Section 631 of the Indonesian Code of Civil Procedure, the Parties agree that the Tribunal need not be bound by strict rules of law where they consider the application thereof to particular matters to be inconsistent with the spirit of this Contract and the underlying intent of the Parties, and as to such matters their conclusion shall reflect their judgment of the correct interpretation of all relevant terms hereof and the correct and just enforcement of this Contract in accordance with such terms.

JOC at Art. 13.2(b); ESC at § 8.2(b).

> The parties hereby renounce their right to appeal from the decision of the arbitral panel and agree that in accordance with Section 641 of the Indonesian Code of Civil Procedure neither Party shall appeal to any court . . . and accordingly the Parties hereby waive the applicability of Articles 15 and 108 of the Law No. 1 of 1950 and any other provision of Indonesian law and regulations that would otherwise give the right to appeal the decisions of the arbitral panel.

JOC at Art. 13.2(d); ESC at § 8.2(d).

procedural law of that place applies to the arbitration.[32] Authorities on international arbitration describe an agreement providing that one country will be the site of the arbitration but the proceedings will be held under the arbitration law of another country by terms such as "exceptional"; "almost unknown";[33] a "purely academic invention";[34] "almost never used in practice";[35] a possibility "more theoretical than real"; and a "once-in-a-blue-moon set of circumstances."[36] Commentators note that such an agreement would be complex, inconvenient, and inconsistent with the selection of a neutral forum as the arbitral forum.[37]

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[32] Albert Jan van den Berg, "The Application of the New York Convention by the Courts," *ICCA Congress Series No. 9* 25, 26 (Kluwer 1999); Sir Michael J. Mustill & Stewart C. Boyd, *The Law and Practice of Commercial Arbitration in England* 64 (Butterworths 2d ed.1989); Alain Hirsch, *The Place of the Arbitration and the* Lex Arbitri, 34 Arb. J. 43, 46 (1979); Alan Scott Rau, *The New York Convention in American Courts*, 7 Am. Rev. Int'l Arb. 213, 224 (1996). In their reports filed in the district court, recognized authorities on international arbitration retained by both Pertamina and KBC, including Albert Jan van den Berg, Sudargo Guatama, Alan Scott Rau, and Eric A. Schwartz, agreed that under the Convention, arbitration clauses designating the site of the arbitration presumptively designate that site as the source of the applicable procedural law.

[33] Mustill and Boyd, *Commercial Arbitration* at 64.

[34] Van den Berg, The Application of the New York Convention at 26.

[35] *Id.*

[36] Martin Hunter, *Case and Comment: International Arbitration*, [1988] Lloyd's Mar. & Comm. L.Q. 23, 26.

[37] *See, e.g.*, Gary B. Born, *International Commercial Arbitration: Commentary and Materials* 761 (2d ed.2001). Few reported cases involve arbitration clauses that separate the law of the forum state and the *lex arbitri*. In two such English cases, *Naviera Amazonica Peruana S.A. v. Compania Internacional de Seguros del Peru*, [1988] 1 Lloyd's L. Rep. 116 (C.A.1987), and *Union of India v. McDonnell Douglas Corp.*, [1993] 2 Lloyd's Rep. 48 (Q.B. 1992), the courts applied the presumption that the procedural law of the place specified as the forum for the arbitration

In the JOC and ESC, the parties expressly agreed that Switzerland would be the site for the arbitration. This agreement presumptively selected Swiss procedural law to apply to the arbitration. There is no express agreement in the JOC or ESC that Indonesia would be the country "under the law of which" the arbitration was to be conducted and the Award was to be made.[38] The Tribunal recognized the parties' selection of Switzerland by issuing the Award as "[m]ade in Geneva." In selecting Switzerland as the site of the arbitration, the parties were not choosing a physical place for the arbitration to occur, but rather the place where the award would be "made." Under Article 16(1) of the UNCITRAL rules, the "place" designated for an arbitration is the legal rather than physical location of the forum.[39] The arbitration proceeding in this case physically occurred in Paris, but the Award was "made in" Geneva, the place of the arbitration in the legal sense and the presumptive source of the applicable procedural law.[40]

The references in the contracts to certain Indonesian civil procedure rules do not rebut the strong presumption that

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would govern. *Naviera Amazonica Peruana,* [1988] 1 Lloyd's L. Rep. at 119; *Union of India,* [1993] 2 Lloyd's Rep. at 50. The Hong Kong court also relied upon this presumption in determining that Swiss procedural law governed the arbitration proceeding at issue in this case. *Hong Kong decision* at 7-8.

[38] 9 U.S.C. § 201, Art. V(1)(e).

[39] *See* Jacomijn J. van Hof, *Commentary on the UNCITRAL Arbitral Rules: The Application by the Iran-U.S. Claims Tribunal* 109-10 (Kluwer 1991); *see also UNCITRAL Arbitration Rules* at Art. 16(1). Rules 16(2) and (3) expressly permit proceedings to be conducted at a location different from the designated "place" of the arbitration. *UNCITRAL Arbitration Rules* at Art. 16(2)-(3). Rule 16(4) provides that "[t]he award shall be made at the place of arbitration." *Id.* at Art. 16(4).

[40] Van Hof, *Commentary on the UNCITRAL Arbitral Rules* at 109-110.

Swiss procedural law applied to the arbitration.[41] These references fall far short of an express designation of Indonesian procedural law necessary to rebut the strong presumption that designating the place of the arbitration also designates the law under which the award is made.

Pertamina and the Republic have belatedly asserted that the district court should have conducted a choice-of-law analysis to determine the law that would apply to the interpretation of the parties' contracts, rather than analyze the contracts under the New York Convention. Pertamina and the Republic assert that the result of such an analysis would have been to identify Indonesian law as the decisional law under which to interpret the contracts. This argument is inconsistent with the position Pertamina–and its experts on interpreting international commercial arbitration agreements–took earlier in this case, that the district court should review the Tribunal's interpretation of the contracts under the New York Convention. A court conducts the multifactor choice-of-law analysis Pertamina now advocates in the absence of an effective choice of law by the parties to an arbitration agreement.[42] In the JOC and ESC, the parties presumptively chose Swiss procedural law as the *lex arbitri* when they

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[41] Robert N. Hornick, one of the authorities on international arbitration and Indonesian law who submitted an affidavit and report in the district court, provided an explanation for the references to the Indonesian laws in the arbitration clauses unrelated to any intent to designate Indonesia as the country under the law of which the Award would be made. Hornick explained that each article of Indonesian law cited in the contracts imposes a requirement inconsistent with the contemplated arbitration. (Hornick Decl. ¶¶ 28-32). These articles could have been invoked to oppose later enforcement of the Award in Indonesia unless waived. By waiving in advance provisions that could later be invoked to block enforcement of the Award in an Indonesian court, the parties facilitated future enforcement efforts in Indonesia. (*Id.*).

[42] Rest. (2d) Confl. §§ 187, 188, & 218 (1971).

designated Switzerland as the site of the arbitration, and that presumption is unrebutted.[43]

As the district court, another panel of this court, and the Hong Kong Court of First Instance have all recognized, Pertamina's previous arguments that Swiss arbitral law applied strongly evidence the parties' contractual intent.[44] Pertamina represented to the Tribunal that Swiss procedural law applied.[45] As but one example, Pertamina cited Swiss procedural law in arguing that the Tribunal could not consolidate the claims under the JOC and ESC into one proceeding. Pertamina at no point argued to the Tribunal that Indonesian procedural law applied. Pertamina initially sought

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[43] Certain sections and comments of the *Restatement* also support a determination that Swiss law applied to the arbitration agreement. *See, e.g. id.* at § 188 (incorporating Rest. (2d) Confl. § 6, which requires consideration of the relevant policies of the forum); *id.* at § 218 cmt. b (suggesting that the arbitration forum may have the most significant relationship to the arbitration and that a contractual provision requiring arbitration to occur in a certain forum may evidence an intention by the parties that the local law of this forum should govern).

[44] *Karaha Bodas Co.*, 335 F.3d at 371; *Hong Kong decision* at 12.

[45] *See, e.g.*, Prelim. Award, § B(1) ("The Respondents support this conclusion by making reference to Swiss law as the JOC and the ESC provide for UNCITRAL Arbitration in Geneva between the parties which are neither Swiss nor Swiss resident. As a result, and under both contracts, the arbitration proceedings are governed by Chapter 12 of the Swiss Private International Law Statutes. Under Swiss law, [Respondent contends] the Arbitral Tribunal is lacking jurisdiction because KBC failed to comply with the contractual prerequisites to arbitration."); *id.* at § C(1) ("The Respondents also state that, under the arbitration agreements and Swiss law, the arbitrators have no power to consolidate . . . ."); *id.* at § C(3) (citing a Swiss federal tribunal case in support of its decision that a consolidated arbitration was appropriate); *id.* at § D(1) (Respondents contend that "[s]uch solution is not acceptable under the applicable Swiss law").

to set aside the Award in a Swiss court.[46] Pertamina asked the Texas district court to stay its enforcement proceeding until Pertamina's appeal in Switzerland was resolved. In making this argument, Pertamina stated that "[t]he arbitration . . . was conducted according to the laws of Switzerland, and the Swiss court is empowered to vacate an award rendered in Switzerland. . . . KBC is asking this Court to act prematurely to confirm an award that might be overturned in the country whose law governed the arbitration."[47]

The Tribunal's decision that Swiss arbitral law applied does not make the Award unenforceable.[48] The combination of the parties' selection of Switzerland as the site of the arbitration; the failure clearly or expressly to choose Indonesian arbitral law in their agreements, as required to select arbitral law other than that of the place of the arbitration; and the clear evidence provided by the parties' own conduct that they intended Swiss law to apply to the arbitration, amply supports the district court's determination that the Tribunal properly applied Swiss procedural law.

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[46] In the district court, Pertamina presented an affidavit and report from an expert on international commercial arbitration that weakly attempted to explain the appeal to the Swiss court as a mistake. The theory that Pertamina's lawyers erred and applied to the wrong court for annulment—and then moved for reconsideration when that court dismissed the appeal—is utterly without support in the record.

[47] *See Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509, 121 S.Ct. 1724, 149 L.Ed.2d 740 (2001) (citations omitted) ("[I]f an 'arbitrator is even arguably construing or applying [a] contract and acting within the scope of his authority,' the fact that 'a court is convinced he committed serious error does not suffice to overturn his decision.'").

[48] *Europcar Italia*, 156 F.3d at 315; *Nat'l Wrecking Co.*, 990 F.2d at 960; *see Garvey*, 532 U.S. at 509, 121 S.Ct. 1724 ("Courts are not authorized to review [an] arbitrator's decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties' agreement.").

The district court also found that under the doctrine of judicial estoppel, Pertamina's prior conduct precluded it from arguing against the application of Swiss procedural law. The doctrine prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or earlier proceedings.[49] "The policies underlying the doctrine include preventing internal inconsistency, precluding litigants from 'playing fast and loose' with the courts, and prohibiting parties from deliberately changing positions according to the exigencies of the moment."[50] Fifth Circuit courts have identified two limitations on judicial estoppel: (1) the position of the party to be estopped must be clearly inconsistent with its prior position; and (2) the court must have accepted that prior position.[51] Judicial acceptance requires that the court adopted the position previously urged by a party, whether as a preliminary matter or as part of a final disposition.[52]

The district court did not abuse its discretion in imposing judicial estoppel to preclude Pertamina from arguing against the application of Swiss procedural law. Pertamina repeatedly represented to the Tribunal and to the district court that Swiss procedural law controlled the arbitration.[53] Both the

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[49] *Hall v. GE Plastic Pac. PTE Ltd.*, 327 F.3d 391, 396 (5th Cir.2003); *see In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir.1999) (quoting *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir.1988)) (describing judicial estoppel as "a common law doctrine by which a party who has assumed one position in his pleadings may be estopped from assuming an inconsistent position"); *see also Ahrens v. Perot Sys. Corp.*, 205 F.3d 831, 833 (5th Cir. 2000); *Ergo Sci., Inc. v. Martin*, 73 F.3d 595, 598-600 (5th Cir. 1996).

[50] *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir.1993).

[51] *Hall*, 327 F.3d at 396; *Ahrens*, 205 F.3d at 833; *Coastal Plains*, 179 F.3d at 206.

[52] *Coastal Plains*, 179 F.3d at 206.

[53] *See* note 24.

Tribunal and the district court relied on these representations in their decisionmaking. In the Award, the Tribunal accepted Pertamina's argument that Swiss procedural law applied. The district court adopted Pertamina's position that Swiss law applied in delaying the enforcement proceedings pending the Swiss court's resolution of the appeal.[54] Pertamina's argument that Indonesian procedural law governed the arbitration is clearly inconsistent with its prior position that Swiss procedural law controlled.[55] Pertamina belatedly suggests that its positions are not inconsistent because the New York Convention permits multiple primary jurisdictions. As addressed more fully below, this record makes it clear that only the Swiss courts had primary jurisdiction over this Award. Judicial estoppel provides an additional ground for concluding that Swiss procedural law applied to the arbitration proceeding.[56]

C. The Procedural Challenges to the Arbitral Award

1. Consolidation of the Claims under the JOC and ESC into One Arbitration Proceeding

Under Article V(1)(d) of the New York Convention, a court may refuse to enforce an arbitration award if "[t]he

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[54] *See Coastal Plains*, 179 F.3d at 206 (noting that the acceptance prong of judicial estoppel can be satisfied by a court's acceptance of a party's position "as a preliminary matter").

[55] *See Hall*, 327 F.3d at 396; *Ahrens*, 205 F.3d at 833; *Coastal Plains*, 179 F.3d at 206.

[56] *See Hall*, 327 F.3d at 396; *Coastal Plains*, 179 F.3d at 206; *Ahrens*, 205 F.3d at 833. The High Court of Hong Kong Court estopped Pertamina from asserting application of Indonesian procedural law for the same reasons. *Hong Kong decision* at 9-12. The High Court also emphasized the dilatoriness of Pertamina's argument: "Pertamina's position on the [applicable procedural law] only changed 30 months after the preliminary award was published, 15 months after the Final award (December 2000) and seven months after the Swiss Court dismissed the petition for revision (August 2001)." *Id.* at 11.

composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place."[57] Pertamina argues that because the JOC and ESC were separate contracts with separate arbitration clauses, and because neither contract expressly allowed the consolidation of claims, the Tribunal improperly consolidated the claims into one arbitration proceeding. Pertamina also contends on appeal that because Indonesian rather than Swiss procedural law governed the arbitration, the Tribunal's reliance on Swiss procedural law to consolidate the claims was erroneous.

The Tribunal carefully analyzed the parties' contracts in concluding that a consolidated arbitration of KBC's claims against Pertamina and PLN under the JOC and ESC was appropriate. In factual findings set out in the Preliminary Award, the Tribunal set out the basis for concluding that the two contracts were integrated such that "the parties did not contemplate the performance of two independent contracts but the performance of a single project consisting of two closely related parties."[58] The Tribunal continued:

> In such circumstances, the conclusion of this Arbitral Tribunal is that KBC's single action should be admitted, provided it is appropriate. The Arbitral Tribunal has not the slightest doubt in this respect. Due to the integration of the two contracts and the fact that the Presidential

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[57] 9 U.S.C. § 201, Art. V(1)(d).

[58] Article 15.3 of the ESC provided that "the terms of [the ESC] and the Joint Operation Contract constitute the entire agreement between the parties hereto." Article 1.2 of the JOC stated that "[e]ach such Energy Sales Contract shall be an integral part of this contract, and to the extent the provisions of the Energy Sales Contract obligate the parties hereto, shall be deemed incorporated into this contract for all purposes." Pertamina and KBC entered into the JOC and ESC on the same day. The JOC and the ESC contained virtually identical arbitration provisions.

> Decrees, the consequences of which are at the origin of the dispute, affected both of them, the initiation of two separate arbitrations would be artificial and would generate the risk of contradictory decisions. Moreover, it would increase the costs of all the parties involved, an element of special weight in the light of difficulties faced by the Indonesian economy, to which counsel for [Pertamina] legitimately drew the Arbitral Tribunal's attention.

The record provides ample support for the Tribunal's findings and conclusion that the two contracts were integrated such that the parties contemplated a single arbitration.

The Tribunal cited the Swiss law concept of "connexity" in analyzing the legal relations among KBC and Pertamina under the JOC and KBC, Pertamina, and PLN under the ESC as one of the factors justifying the consolidation of claims under the two contracts into one arbitration proceeding. The Tribunal concluded that the relationship of the JOC and ESC exceeded the standard of "connexity" under Swiss law. "The use of the word 'connexity' to describe the relationship between the JOC and the ESC would be an understatement. In reality, the two contracts are integrated." Courts and arbitration tribunals have recognized that claims arising under integrated contracts may be consolidated into single arbitrations.[59] The Tribunal cited one other factor that supported

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[59] *See, e.g., Conn. Gen. Life Ins. Co. v. Sun Life Assur. Co. of Canada,* 210 F.3d 771, 774 (7th Cir. 2000); *Maxum Found., Inc. v. Salus Corp.,* 817 F.2d 1086, 1087-88 (4th Cir. 1987). Pertamina cites cases decided under the FAA and the law of different American jurisdictions for the proposition that courts do not have the authority to order arbitrations without the parties' approval. *See, e.g., Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 221, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985) ("The preeminent concern of Congress in passing the [FAA] was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation. . . ."); *Gov't of the United Kingdom*

consolidation: "appropriateness." The parties agreed to the application of the UNCITRAL Rules, which permit a tribunal to conduct an arbitration "in such manner as it considers appropriate."[60] Pertamina does not dispute the application of the UNCITRAL Rules to the arbitration proceeding.

Courts are reluctant to set aside arbitral awards under the New York Convention based on procedural violations, reflected in cases holding that the Convention embodies a proenforcement bias.[61] The Tribunal emphasized in its Preliminary Award that although the claims would be consolidated, "the position of each party has to be considered independently when discussing the substance of the case, on the basis of their respective legal and contractual situations." The record reflects that the Tribunal kept this promise. There is no prejudice arising from the consolidation that would justify a refusal to enforce the Award.

2. The Composition of The Tribunal

Under Article V(1)(d), a court may refuse enforcement of an arbitral award if the composition of the tribunal is not in

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and N. Ireland v. Boeing Co., 998 F.2d 68, 74 (2d Cir.1993); *Protective Life Ins. v. Lincoln Nat. Life Ins.*, 873 F.2d 281, 282 (11th Cir. 1989). These cases do not involve contracts so closely related as to manifest the parties' agreement to be joined in arbitration proceedings involving parties and claims under those integrated contracts.

[60] *UNCITRAL Arbitration Rules* at Art. 15(1).

[61] *See, e.g., China Minmetals Materials Imp. and Exp. Co., Ltd. v. Chi Mei Corp.*, 334 F.3d 274, 282-83 (3d Cir. 2003); *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1120 (9th Cir.2000); *Alghanim*, 126 F.3d at 20; *Parsons & Whittemore Overseas*, 508 F.2d at 973; *Compagnie des Bauxites de Guinee v. Hammermills, Inc.*, 1992 WL 122712, at *5 (D.D.C. May 29, 1992); *Am. Constr. Mach. & Equip. Corp. Ltd. v. Mechanised Constr. of Pakistan, Ltd.*, 659 F. Supp. 426, 428 (S.D.N.Y.1987).

accordance with the parties' agreement.[62] The JOC provided for the appointment of arbitrators, as follows:

> Each Party [KBC and Pertamina] will appoint an arbitrator within thirty (30) days after the date of a request to initiate arbitration, who will then jointly appoint a third arbitrator within thirty (30) days of the date of the appointment of the second arbitrator, to act as Chairman of the Tribunal. Arbitrators not appointed within the time limits set forth in the preceding sentence shall be appointed by the Secretary General of the International Center for Settlement of Investment Disputes.

The ESC procedure for arbitrators' appointment was slightly different:

> PLN on one hand, and [KBC] and PERTAMINA, on the other hand, will each appoint one arbitrator, in each case within thirty (30) days after the date of a request to initiate arbitration, who will then jointly appoint a third arbitrator within thirty (30) days of the date of the appointment of the second arbitrator, to act as Chairman of the Tribunal. Arbitrators not appointed within the time limits set forth in the preceding sentence shall be appointed by the Secretary General of the International Center for Settlement of Investment Disputes, upon the request of any Party.

Each contract required the appointment of arbitrators within thirty days of the notice of arbitration and provided for appointment by the ICSID in the event that a party did not do so.

In its notice of arbitration sent to Pertamina, KBC appointed Professor Piero Bernardini to serve as an arbitrator. Pertamina did not designate an arbitrator within thirty days, nor did it object to KBC's selection at that time. By letter

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[62] 9 U.S.C. § 201, Art. V(1)(d).

dated June 2, 1998. KBC notified the ICSID of Pertamina's inaction and requested the appointment of a second arbitrator under the default appointment provisions of the contracts. Pertamina did not respond to this letter. The ICSID questioned KBC about the consolidation of claims under the JOC and the ESC and KBC's unilateral appointment of an arbitrator. KBC responded by letter dated June 22, 1998. The ICSID confirmed receipt of KBC's letters and in a June 29, 1998 letter to all parties, recapped the prior correspondence, noted Pertamina's failure to respond, and expressed its intent to grant KBC's request to appoint the second arbitrator. The ICSID Secretary-General identified Dr. Ahmed El-Kosheri as its candidate and asked for any objections by July 13, 1998. The ICSID sent all the preceding correspondence to PLN by courier and to Pertamina by fax and courier. Despite the Secretary-General's invitation to do so, neither Pertamina nor PLN lodged objections or responses to the proposed appointment. On July 13, 1998, having received no communications from Pertamina, the ICSID notified Pertamina and PLN of its intent to appoint Dr. El-Kosheri and made the appointment on July 15, 1998. Under the JOC and ESC, Professor Bernardini and Dr. El-Kosheri then selected the chairman of the arbitration panel, Yves Derains.

In its Preliminary Award, the Tribunal rejected Pertamina's argument that KBC's selection of an arbitrator violated the ESC's requirement that KBC and Pertamina jointly make the nomination. The Tribunal found that the parties intended to limit that requirement to disputes in which PLN was opposed to KBC and Pertamina. Because the ESC did not expressly address the method for appointing arbitrators when KBC and Pertamina opposed each other, the Tribunal found that UNCITRAL Arbitration Rules for appointment applied. The Tribunal ruled that the appointment procedures used did not violate these rules or create an inequality of treatment. The Tribunal emphasized Pertamina's failure to nominate an

arbitrator or object to those nominated. The district court agreed with the Tribunal's reasoning and added that Pertamina had failed to demonstrate any prejudice from the appointment proceedings.

On appeal, Pertamina reasserts its argument that KBC's unilateral selection of an arbitrator violated the ESC's requirement that "PLN on the one hand and [KBC] and Pertamina, on the other hand, will each appoint one arbitrator." Pertamina contends that its interests would always be aligned with KBC under the ESC, which required PLN to purchase from Pertamina the electricity that KBC provided, and that this explains the contractual requirement that KBC and Pertamina agree on an arbitrator in a dispute arising under that contract. In response, KBC argues that the Tribunal correctly found that a dispute between KBC and Pertamina was possible under the ESC, but in the event of such a dispute, the ESC did not provide a procedure for choosing an arbitrator. KBC asserts that the Tribunal correctly found that the general UNCITRAL rules for selecting an arbitrator would apply, under which KBC, Pertamina, and PLN would each appoint an arbitrator. In addition, KBC argues that the district court correctly found that Pertamina had failed to object to KBC's selection of Professor Bernardini as an arbitrator and failed to nominate an arbitrator despite the ICSID's requests. Finally, KBC argues that Pertamina cannot show prejudice that would make the Award unenforceable.

The ESC arbitration clause refers to "any dispute or difference of any kind whatsoever" arising among "the Parties." Section 2 of the ESC defines "parties" to include PLN, Pertamina, and KBC. By its terms, the arbitration clause covers a dispute between KBC and Pertamina arising under the ESC, as well as a dispute in which the interests of KBC and Pertamina are aligned. If the ESC required KBC and Pertamina jointly to select an arbitrator for disputes in

which KBC and Pertamina were opposed, as Pertamina contends, Pertamina could effectively block arbitration under the ESC simply by refusing to agree with KBC to the selection of an arbitrator. Such an interpretation would make the ESC arbitration clause illusory. In addition, Pertamina had numerous opportunities early in the proceedings to object to KBC's selection of Professor Bernardini as an arbitrator and to nominate its own arbitrator. Pertamina did not challenge the composition of the arbitral panel until after the entire panel had been selected and seated. Pertamina's failure timely to object to Professor Bernardini's selection and to nominate its own arbitrator was, as the district court noted, a strategic decision that Pertamina should not now be able to assert as a defense to enforcing the Award.[63]

Pertamina has failed to meet its burden of showing that the Tribunal was improperly constituted. The Tribunal reasonably interpreted the ESC's arbitration provisions and reasonably applied the UNCITRAL arbitration rules. Despite numerous opportunities, Pertamina failed to challenge the Tribunal's composition until after the arbitrators were selected. The procedural infirmities Pertamina alleges do not provide grounds for denying enforcement of the Award.

D. The Due Process Challenges to the Arbitral Award

Under Article V(1)(b), enforcement of a foreign arbitral award may be denied if the party challenging the award was "not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to

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[63] Pertamina apparently argued to the Tribunal that it did not name an arbitrator because it was contesting the legitimacy of the arbitration and further contended that it did not receive certain correspondence from ICSID regarding KBC's request that the ICSID appoint a second arbitrator. Pertamina, however, did not make these arguments before the district court.

present [its] case."[64] Article V(1)(b) "essentially sanctions the application of the forum state's standards of due process," in this case, United States standards of due process.[65] A fundamentally fair hearing requires that a party to a foreign arbitration be able to present its case.[66] A fundamentally fair hearing is one that "meets 'the minimal requirements of fairness'—adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator."[67] The parties must have an opportunity to be heard "at a meaningful time and in a meaningful manner."[68] "The right to due process does not include the complete set of procedural rights guaranteed by the Federal Rules of Civil Procedure."[69]

1. The Claim that the Final Award "Reversed" the Preliminary Award

Pertamina first contends that the Tribunal reversed the Preliminary Award in the Final Award without notice, denying Pertamina the opportunity to be "meaningfully heard." Pertamina emphasizes the Tribunal's ruling that "a governmental decision which prevents KBC [from] perform[ing] its

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[64] 9 U.S.C. § 201, Art. V(1)(b).

[65] *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 145 (2d Cir.1992) (quoting *Parsons & Whittemore Overseas*, 508 F.2d at 975).

[66] *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 592 (7th Cir. 2001); *Generica, Ltd. v. Pharm. Basics, Inc.*, 125 F.3d 1123, 1130 (7th Cir.1997).

[67] *Slaney*, 244 F.3d at 592 (quoting *Sunshine Mining Co. v. United Steelworkers*, 823 F.2d 1289, 1295 (9th Cir.1987)); *Generica*, 125 F.3d at 1130 (quoting same).

[68] *Iran Aircraft Indus.*, 980 F.2d at 146 (citations omitted).

[69] *Matter of Arbitration Between Trans Chem. Ltd. and China Nat. Mach. Imp. & Exp. Corp.*, 978 F.Supp. 266, 310 (S.D.Tex.1997), *aff'd*, 161 F.3d 314 (5th Cir.1998).

obligations is not deemed to be a breach of contract by Pertamina or PLN but a Force Majeure event excusing KBC's nonperformance."

The Tribunal stated in the Preliminary Award that the force majeure clause in the JOC and ESC made a "government-related event" an event of force majeure only with respect to KBC. The Tribunal stated that Pertamina and PLN were so closely related to the Indonesian government that a decision by the Indonesian government was not a force majeure event as to them. In its briefing before the Tribunal made its Final Award, KBC argued that under the contract language and given the close relationship between Pertamina and the Indonesian government, Pertamina bore the risk of loss from a force majeure event under the JOC and ESC. Pertamina responded that in the Preliminary Award, the Tribunal had ruled that acts of force majeure by the Indonesian government are not breaches of the JOC and ESC and that to award KBC damages would be incompatible with that ruling. In the Final Award, the Tribunal found that the Indonesian government's actions were an event of force majeure that excused KBC's failure to perform under the JOC and ESC. The Tribunal stated that this finding did not contradict its ruling in the Preliminary Award that the Indonesian government was not a party to the JOC or ESC, because that ruling "was not meant to express any view as to the consequences to Pertamina ... of a Governmental decision which prevents the performance of the Contracts."

The record shows that Pertamina knew it could be found liable for nonperformance after the Preliminary Award had issued. After the Preliminary Award issued, KBC argued to the Tribunal that Pertamina bore the risk of nonperformance under the JOC and ESC in the event of force majeure. KBC's argument clearly assumed that the Preliminary Award allowed the Tribunal to find that the contracts placed the risk of, and liability for, such nonperformance on Pertamina. In

response to that argument, Pertamina had, and took, the opportunity fully to present its arguments against KBC's theory of liability.

The Final Award shows that the Tribunal considered and rejected Pertamina's argument in making its liability decision. The Tribunal concluded that the JOC and ESC allocated the risk of government interference with the project solely to Pertamina and PLN. In this enforcement proceeding, Pertamina is essentially repeating the arguments it made to the Tribunal. The fact that those arguments were presented to and considered by the Tribunal is inconsistent with Pertamina's claim that it had no notice of the need to make the argument to that Tribunal or the opportunity to do so. Pertamina did not suffer the fundamental unfairness it claims, so as to support a refusal to enforce the Award.[70]

2. The Tribunal's Denial of a Continuance and Request for Additional Discovery

To challenge KBC's contention that FPL was willing to finance the project, Pertamina sought in the arbitration proceeding a continuance and discovery of the following documents from KBC, FPL, and Caithness regarding the financing of the KBC project:

> (1) All documents relating to efforts to obtain financing for the Karaha-Bodas project during the period September 1997 through June 1998.
>
> (2) All documents showing any consideration of providing direct financing (whether through bridge financing, a loan guarantee, or direct equity investment) for the Karaha-Bodas project during the period September 1997 through June 1998.

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[70] *See Europcar Italia*, 156 F.3d at 315 ("Absent extraordinary circumstances, a confirming court is not to reconsider the arbitrator's findings.").

(3) All documents relating to FPL's, its subsidiaries', or its predecessors' consideration of whether to invest in the Karaha-Bodas project.

(4) All documents relating to FPL's, its subsidiaries', or its predecessors' decision to invest in the Karaha-Bodas project, stated variously to have occurred in mid-1996 or mid-1997.

(5) All documents sent by KBC to FPL, its subsidiaries, or its predecessors following the investment identified in ¶ 4 and concerning geothermal exploration and development in the Karaha-Bodas concession area (whether such exploration occurred before or after the investment).

(6) All documents relating to evaluation by each, any and all of KBC, FPL (or subsidiaries or predecessors), and Caithness whether to proceed with the Karaha-Bodas project during the period September 1997 through June 1998.

The Tribunal denied Pertamina's request.

After Pertamina discovered that FPL and certain other investors in KBC owned a political risk insurance policy underwritten by Lloyd's of London, which had paid $75 million after the project suspension, Pertamina sought reconsideration of the district court's summary judgment enforcing the Award under Rule 60(b). The district court found that Pertamina's inability to introduce evidence of the insurance policy at the arbitration did not prevent the presentation of its case to the Tribunal. The district court also held that KBC's failure to bring the insurance policy to the Tribunal's attention did not make enforcing the Award a violation of public policy. We agree.

"An 'arbitrator is not bound to hear all of the evidence tendered by the parties. . . . [He] must give each of the parties

to the dispute an adequate opportunity to present its evidence and arguments.'"[71] It is appropriate to vacate an arbitral award if the exclusion of relevant evidence deprives a party of a fair hearing.[72] "Every failure of an arbitrator to receive relevant evidence does not constitute misconduct requiring vacatur of an arbitrator's award. A federal court may vacate an arbitrator's award only if the arbitrator's refusal to hear pertinent and material evidence prejudices the rights of the parties to the arbitration proceedings."[73]

Although the Tribunal denied Pertamina the specific discovery it sought on the issue of FPL financing, Pertamina was able to cross-examine the KBC witnesses who testified that FPL was willing to provide financing for the project, Leslie Gelber and Robert McGrath. Before those witnesses testified, Pertamina had already presented substantial evidence in its response to KBC's Statement of Claim as to why KBC would not have been able to secure financing for the project, emphasizing the depressed state of the Indonesian economy and its unattractiveness to investors. Pertamina argued to the Tribunal that KBC had presented no documentary evidence of FPL's willingness to finance the project and asserted that FPL would have required such a high rate of interest because of the risk involved as to make the KBC venture unprofitable.

The Tribunal found that "the issue remained open in 1998 of the terms and conditions upon which financing could have been obtained for the Project development." The Tribunal

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[71] *Generica*, 125 F.3d at 1130 (quoting *Hoteles Condado Beach, La Concha and Convention Ctr. v. Union De Tronquistas Local 901*, 763 F.2d 34, 39 (1st Cir. 1985)); *see Slaney*, 244 F.3d at 592 (cautioning that "parties that have chosen to remedy their disputes through arbitration rather than litigation should not expect the same procedures they would find in the judicial arena").

[72] *Generica*, 125 F.3d at 1130; *Slaney*, 244 F.3d at 592.

[73] *Hoteles Condado Beach*, 763 F.2d at 40 (internal citations omitted).

noted that "the worsening of the economic and political situation in Indonesia at the time has to be taken into account as regards both the conditions at which financing could have been obtained and possible delays in arranging the same." The Tribunal, however, noted that the parties contemplated the possibility of a delay in arranging financing, because the ESC provided that the contract could be suspended for up to two years if KBC was unable to arrange financing for the project. The Tribunal also noted KBC's efforts to reinstate the project after the initial government suspension order, finding that KBC was ready and willing to secure financing for the project. The Tribunal found the testimony of KBC's witnesses on financing credible, stating that it had "no reason ... to cast doubts about KBC's readiness, directly and/or through its shareholders, to make provision thereof." In determining the lost profits, the Tribunal considered all the risks of the project, including the potential difficulties in arranging financing that Pertamina cited, and "significantly reduc[ed]" the amount of lost profits claimed by KBC.

In *Generica, Ltd. v. Pharmaceutical Basics, Inc.*,[74] the party opposing enforcement of an international arbitration award argued that the tribunal curtailed cross-examination of a witness, in violation of the party's due process right to present its case.[75] The tribunal, recognizing that it had curtailed the cross-examination, placed diminished reliance on the witness's testimony.[76] The court found that by limiting the reliance on the witness's testimony, the arbitrators eliminated the possibility of prejudice to the party claiming a due process violation.[77] The court confirmed the award.[78] As

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[74] 125 F.3d 1123 (7th Cir.1997).

[75] *Id.* at 1129-31.

[76] *Id.* at 1131.

[77] *Id.*

[78] *Id.*

in *Generica*, the Tribunal appears to have given all the evidence as to damages, including the availability of financing, appropriate weight in determining liability and damages.

In *Tempo Shain Corp. v. Bertek, Inc.*,[79] the arbitral panel did not allow a potential witness to testify on the basis that the witness's testimony was cumulative.[80] The court vacated the arbitral award.[81] The record showed that the witness would have testified to facts that only he could have known, making his testimony essential.[82] Similarly, in *Hoteles Condado Beach, La Concha and Convention Center v. Union De Tronquistas Local 901*,[83] the court vacated an award because the arbitral panel refused to give any weight to the only evidence available to the losing party.[84] In the present case, by contrast, the Tribunal's language in the Final Award and the record show that the testimony about FPL's willingness to provide financing was only one factor relevant to damages. KBC raised the possibility of FPL's direct financing only in response to Pertamina's affirmative defense that KBC could not have financed the project. Pertamina did not seek discovery on KBC's efforts to finance the project in the arbitration proceeding until after KBC filed its rebuttal to the response to the Statement of Claim, despite the fact that Pertamina raised the issue as an affirmative defense.

The record shows that the Tribunal's refusal to grant a continuance and additional prehearing discovery did not "so affect the rights of [Pertamina] that it may be said that [it]

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[79] 120 F.3d 16 (2d Cir.1997).

[80] *Id.* at 20.

[81] *Id.* at 21.

[82] *Id.* at 20.

[83] 763 F.2d 34 (1st Cir.1985).

[84] *Id.* at 40.

was deprived of a fair hearing."[85] Pertamina was able to present comprehensive evidence of investment conditions in Indonesia and expert opinions on the availability of financing, as well as cross-examine Gelber and McGrath on FPL's asserted willingness and ability to provide financing.[86]

Pertamina contends that the late revelation of the political risk insurance policy refutes KBC's contention in the arbitration that FPL was willing to finance KBC to protect the $40 million it had previously invested in KBC. The existence of the political insurance policy was not "central or decisive" to Pertamina's case.[87] In order to show damages, KBC had to show that if the project had not been suspended, KBC could have proceeded to perform by obtaining financing. The record amply supports KBC's position that KBC and FPL had already invested substantial money before the Indonesian government issued its suspension order. The existence of the political risk insurance policy is not inconsistent with the testimony of Gelber and McGrath that FPL intended to finance the project and would have done so but for the suspension decreed by the government of Indonesia. The existence of political risk insurance for the project is not inconsistent with FPL's willingness to invest had the project

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[85] *Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co.*, 397 F.2d 594, 599 (3d Cir.1968).

[86] Pertamina acknowledges that it specifically examined Gelber and McGrath about the existence of documents regarding FPL's willingness to finance the project. Pertamina states that the Tribunal had to instruct McGrath to answer the question directly, demonstrating that McGrath was an "evasive" witness. The Tribunal observed McGrath testify and was able to make the credibility judgment that he either lacked knowledge of such documents or was unwilling to discuss them. *Cf. United States v. Garza*, 118 F.3d 278, 283 (5th Cir.1997) (noting that a district court is in the best position to judge the credibility of witnesses and refusing to "second-guess" the lower court's judgment on the issue).

[87] *Cf. Hoteles Condado Beach*, 763 F.2d at 40 (denial of party's only evidence was ground for vacating award).

not been suspended, that is, if the risk insured against had not occurred. The Tribunal's damages analysis and the lost profits award depended on the assumption that the project continued, that is, that the suspension had not taken place.

Pertamina's argument that KBC's political risk insurance policy undermines the Tribunal's finding that the JOC and ESC placed the risk of a government-related event on Pertamina is also unavailing. The Tribunal determined that the JOC and ESC placed the risk of nonperformance due to a government-related event on Pertamina based on a well-reasoned, detailed analysis of the contract terms.[88] The existence of a political risk policy does not undermine this result. Moreover, the political risk policy contained a subrogation provision that required KBC to reimburse the insurer if KBC recovered its losses from another source.[89] The existence of the political risk policy is not inconsistent with the contractual allocation of risk.

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[88] *See, e.g., Talman Home Fed. Sav. & Loan Ass'n of Ill. v. Am. Bankers Ins.*, 924 F.2d 1347, 1351 (5th Cir.1991) (quoting *Republic Nat'l Bank of Dallas v. Nat'l Bankers Life Ins. Co.*, 427 S.W.2d 76, 79 (Tex.App.—Dallas 1968, writ ref'd)) ("The cardinal rule of construction as applied to all contracts is to ascertain the intention of the parties as expressed in the language used in the instrument itself. It is the intention and purpose of contracting parties, as disclosed within the four corners on the instrument which should control.").

[89] This subrogation provision undermines Pertamina's additional argument that, in the alternative, it is entitled to a $75 million offset from the political risk insurance payout. Pertamina argues that enforcement of the judgment, in combination with the insurance proceeds, will permit KBC double recovery in violation of the single-satisfaction rule. *See Tompkins v. Cyr*, 202 F.3d 770, 785 (5th Cir.2000). The subrogation provision of the political risk insurance policy, however, requires that to the extent the insured obtains any recovery from a judgment against Pertamina, the insured is obligated to repay the insurer. In addition, payment by a collateral source does not typically diminish a judgment debt. *See Global Petrotech, Inc. v. Engelhard Corp.*, 58 F.3d 198, 202 (5th Cir.1995). There will be no double recovery, and Pertamina is not entitled to a credit.

The Tribunal asked McGrath whether FPL had purchased "OPIC insurance," a form of political risk insurance. McGrath responded that he did not know the answer to the question. Pertamina's counsel did not follow up on the Tribunal's questioning. At the conclusion of the hearing, the Tribunal chair asked the parties whether the discovery requests were "maintained, all of them, part of them, because we would like to know on what we have to decide." The response from counsel for Pertamina was as follows:

> [T]he purpose of discovery is to prepare for the hearing, it is not to supplement the record after the hearing. So I think the discovery requests are moot, and if discovery is now permitted, then you have to re-open the proceedings and so on. So I treated, notwithstanding the fact that it was theoretically open, I treated this request as effectively being denied, and we went forward. Our request went to the purported financial ability, the purported financing that would have been made available and other things, and I think the record on that has been fully made. I am prepared to rest on that record, and so I think the discovery requests should no longer be in the picture.

The parties submitted extensive posttrial briefs. In the Final Award, issued in December 2000, the Tribunal stated that all parties had "waived their respective requests for discovery" at the conclusion of the hearing.

Pertamina asserts that it did not waive its requests for discovery because the Tribunal denied the request before the hearing, when the discovery could have been of use. Pertamina ignores the fact that in international commercial arbitration, it is not uncommon to ask for additional discovery or information after a hearing, to request additional sessions of a hearing to submit more evidence, or to file posthearing

submissions.[90] Rather than renew its requests for discovery into FPL's willingness to finance the project or to assert a request for discovery into FPL's political risk insurance, Pertamina's counsel expressly stated that the record had been "fully made" and that he was "prepared to rest on the record." The record supports the Tribunal's conclusion that the discovery requests made before the hearing had been waived. Pertamina did not ask for discovery into political risk insurance until it filed its Rule 60(b) motion in the district court.

The Tribunal's denial of a continuance and additional discovery did not prevent Pertamina from presenting its case, so as to deprive it of a fair hearing. Pertamina presented ample evidence in support of its position that KBC would be unable to find financing. The Tribunal considered Pertamina's evidence and gave it considerable weight, awarding KBC damages substantially lower than the amount it sought.[91] Pertamina has failed to show the prejudice required to decline enforcement of the Award on this ground.

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[90] *See, e.g., UNCITRAL Arbitration Rules* at Art. 15(2), 29(2) (stating that a party may request at any stage of the proceeding a hearing for presentation of evidence and that a tribunal may reopen hearings at any time upon request of a party); Jay E. Grenig, *Alternative Dispute Resolution with Forms*, § 5.76 (2d ed. 1997) (including in a description of the customary order of arbitration proceedings the "submission of post-hearing briefs"). *See also Lincoln Nat'l Life Ins. Co. v. Payne*, 286 F.Supp.2d 1023, 1026 (S.D.Ia. 2003); *Techcapital Corp. v. Amoco Corp.*, 2001 WL 267010, at * 2 (S.D.N.Y. March 19, 2001); *Mays v. Lanier Worldwide, Inc.*, 115 F.Supp.2d 1330, 1342 (M.D.Ala.2000); *I. Appel Corp. v. Katz*, 1999 WL 287370, at * 3 n. 2 (S.D.N.Y. May 6, 1999); *United Foods, Inc. v. W. Conference of Teamsters Pension Trust Fund*, 816 F.Supp. 602, 607 (N.D.Cal.1993).

[91] KBC sought $512.5 million in lost profits. The Tribunal awarded KBC $150 million in lost profits. The Tribunal also awarded KBC $111.1 million in lost expenditures.

3. The District Court's Denial of Pertamina's Rule 56(f) Discovery Request

In the district court, after KBC moved for summary judgment on its application to enforce the Award, Pertamina moved for a continuance under Rule 56(f) and sought the same discovery on FPL's willingness and ability to provide project financing that it had sought in the arbitration. The district court denied the Rule 56(f) motion.

The denial of a Rule 56(f) discovery request is reviewed for abuse of discretion.[92] The district court may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts.[93] "If it appears that further discovery will not produce evidence creating a genuine issue of material fact, the district court may, in the exercise of its discretion, grant summary judgment."[94] As one court has explained:

> In judging discovery requests in this context [of an arbitration award confirmation proceeding], the court must weigh the asserted need for hitherto undisclosed information and assess the impact of granting such discovery on the arbitral process. The inquiry is an entirely practical one, and is necessarily keyed to the specific issues raised by the party challenging the award and the degree to which those issues implicated factual questions that cannot be reliably resolved without some further disclosure.[95]

The record shows that in the arbitration, Pertamina was able to present substantial evidence regarding the Indonesian

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[92] *Resolution Trust Corp. v. Sharif-Munir-Davidson Dev. Corp.*, 992 F.2d 1398, 1401 (5th Cir.1993).

[93] *Int'l Shortstop v. Rally's, Inc.*, 939 F.2d 1257, 1267 (5th Cir.1991).

[94] *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1442 (5th Cir.1993).

[95] *Lummus Global Amazonas S.A. v. Aguaytia Energy del Peru S.R. Ltda.*, 256 F.Supp.2d 594, 626 (S.D.Tex.2002) (citations omitted).

economy, the problems in securing financing for projects in Indonesia, and the projected electrical generating capacity of the project. The Tribunal took Pertamina's arguments into account in awarding significantly less in lost profits than KBC had sought. The Tribunal did not solely rely on FPL's willingness to finance the project in determining that KBC was ready to "directly, and/or through its shareholders," finance the project. The Tribunal also looked to KBC's efforts to convince the Indonesian government to restart the project in making this finding. The record supports the district court's denial of a continuance to permit further discovery on KBC's ability to finance the project.

The district court also noted Pertamina's counsel's statement at the conclusion of the arbitration hearing that "the record on [the financing issue] ha[d] been fully made." Pertamina has failed to show that the discovery it sought in the district court would have created disputed fact issues material to determining whether Pertamina received a fundamentally fair hearing before the Tribunal.[96] Because the issue of financing could be reliably resolved without the requested discovery, the district court did not abuse its discretion in denying Pertamina's Rule 56(f) motion.[97]

E. The Public Policy Challenge to the Arbitral Award

Pertamina asserts that the Award violated public policy because it violated the international law doctrine of abuse of

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[96] *See Krim*, 989 F.2d at 1442.

[97] *See Lummus Global Amazonas*, 256 F.Supp.2d at 626; *Resolution Trust Corp.*, 992 F.2d at 1401. For the same reasons, the district court did not err by refusing to permit additional discovery or host an evidentiary hearing before ruling on Pertamina's Rule 60(b) motion. *See Provident Life and Accident Ins. Co. v. Goel*, 274 F.3d 984, 999 (5th Cir.2001) (noting that the only issues on an appeal of a Rule 60(b) motion are the propriety of the denial of relief and whether the district court abused its discretion in denying relief).

rights. Pertamina contends that the Award imposes punishment for obeying a government decree. Pertamina also asserts that KBC's failure to disclose the political risk insurance policy during the arbitration makes enforcement of the Award a violation of public policy.

Under Article V(2)(b) of the New York Convention, a court may refuse to recognize or enforce an arbitral award if it "would be contrary to the public policy of that country."[98] The public policy defense is to be "construed narrowly to be applied only where enforcement would violate the forum state's most basic notions of morality and justice."[99] "The general pro-enforcement bias informing the convention . . . points to a narrow reading of the public policy defense."[100] Erroneous legal reasoning or misapplication of law is generally not a violation of public policy within the meaning of the New York Convention.[101]

An action violates the abuse of rights doctrine if one of the following three factors is present: (1) the predominant motive for the action is to cause harm; (2) the action is totally unreasonable given the lack of any legitimate interest in the exercise of the right and its exercise harms another; and (3) the right is exercised for a purpose other than that for which it exists.[102] The abuse of rights doctrine is not established in

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[98] 9 U.S.C. § 201, Art. V(2)(b).

[99] *M & C Corp.*, 87 F.3d at 851 n. 2 (quoting *Fotochrome, Inc. v. Copal Co., Ltd.*, 517 F.2d 512, 516 (2d Cir.1975)); *see Parsons & Whittemore Overseas*, 508 F.2d at 974; *Slaney*, 244 F.3d at 593.

[100] *Parsons & Whittemore Overseas*, 508 F.2d at 973.

[101] *Coutinho Caro & Co. U.S.A., Inc. v. Marcus Trading, Inc.*, 2000 WL 435566, at *12 (D.Conn. March 14, 2000).

[102] Joseph M. Perillo, *Abuse of Rights: A Pervasive Legal Concept*, 27 Pac. L.J. 37, 47 (Fall 1995).

American law[103] and KBC's actions do not meet the factors required to trigger its application. The evidence in the record is that KBC pursued the arbitration to recover its costs, expenses, and lost profits from the nonperformance of the JOC and ESC.[104] The record does not support Pertamina's argument that enforcing the Award penalizes obedience to a governmental decree. The Tribunal explained in the Final Award that the JOC and ESC shifted the risk of loss resulting from a government-ordered suspension onto Pertamina and PLN. Pertamina is challenging the substance of the Tribunal's interpretation of the JOC and ESC. An arbitration tribunal's contract interpretation does not violate public policy unless it "violates the most basic notions of morality and justice."[105] The Tribunal's interpretation of the JOC and ESC does not approach this steep threshold.

KBC's failure to disclose the political risk insurance policy does not provide a basis for refusing to enforce the Award. Enforcement of an arbitration award may be refused if the prevailing party furnished perjured evidence to the tribunal or if the award was procured by fraud.[106] Courts apply a three-prong test to determine whether an arbitration award is so affected by fraud: (1) the movant must establish the fraud by clear and convincing evidence; (2) the fraud must not have been discoverable upon the exercise of due diligence before or during the arbitration; and (3) the person challenging the award must show that the fraud materially related to an issue in the arbitration.[107] It is not necessary to establish that the

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[103] The abuse of rights doctrine is not even fully established in Louisiana, the American jurisdiction that has invoked it. *See Lloyd v. Georgia Gulf Corp.*, 961 F.2d 1190, 1193 n.4 (5th Cir.1992).

[104] *See* Perillo, 27 Pac. L.J. at 47.

[105] *Slaney*, 244 F.3d at 593.

[106] *Karppinen v. Karl Kiefer Mach. Co.*, 187 F.2d 32, 34 (2d Cir.1951).

[107] *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1383 (11th Cir.1988).

result of the arbitration would have been different if the fraud had not occurred.[108] Courts, however, have held that an arbitration award is not fraudulently obtained when the protesting party had an opportunity to rebut his opponent's claims at the hearing.[109]

In *Biotronik Mess-Und Therapiegeraete GmbH & Co. v. Medford Medical Instrument Co.*,[110] the party opposing enforcement of the award argued that the prevailing party knowingly withheld evidence of an agreement that undermined its case.[111] The court stated that while the party opposing enforcement urged fraud, the real complaint was that the party prevailing in the arbitration should have presented evidence favorable to its opponent's case.[112] The court rejected this argument, stating that "a party cannot complain about the nonproduction of evidence when it failed to offer such evidence itself."[113] In *Catz American Co. v. Pearl Grange Fruit Exchange Inc.*,[114] the party opposing enforcement did not ask the arbitrators to bring certain witnesses before the panel, although the prevailing party offered to make the witnesses available.[115] The panel never called for the witnesses' testimony.[116] The party opposing enforcement of the award argued that the prevailing party should nonetheless have produced the witnesses.[117] The court

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[108] *Id.*

[109] *See Biotronik Mess-Und Therapiegeraete GmbH & Co. v. Medford Med. Instrument Co.*, 415 F.Supp. 133, 137-38 (D.N.J.1976).

[110] 415 F.Supp. 133 (D.N.J.1976).

[111] *Id.* at 137.

[112] *Id.* at 138.

[113] *Id.*

[114] 292 F.Supp. 549 (S.D.N.Y.1968).

[115] *Id.* at 553.

[116] *Id.*

[117] *Id.*

rejected this argument, stating that "[a]rbitrators must be given discretion to determine whether additional evidence is necessary or would simply prolong the proceedings."[118] Because the witnesses were not solely within the prevailing party's control and there was other evidence in the record supporting the other party's position, the court rejected the challenge to the award.[119]

Pertamina argues that KBC's failure to reveal its political risk insurance policy amounts to misconduct warranting a refusal to enforce the Award. There is no evidence in the record that KBC deliberately misled the Tribunal. When the question of political risk insurance arose and was not clearly resolved, Pertamina had the opportunity to ask additional questions, which it chose not to pursue. The Tribunal gave Pertamina an opportunity to pursue discovery requests, which it declined. KBC's failure to produce evidence of political risk insurance, given Pertamina's decisions not to pursue the subject, does not violate public policy. The district court did not err in refusing to deny enforcement of the Award on the basis of a public policy violation or in refusing to grant a new trial on the basis of Rule 60(b).[120]

F. The Effect of the Indonesian Court's Annulment of the Arbitral Award

Pertamina filed an annulment action in the Central District Court of Jakarta, Indonesia in March 2002. That court annulled the Award on August 27, 2002. Pertamina now

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[118] *Id.*

[119] *Id.*

[120] *Cf. Biotronik*, 415 F.Supp. at 138; *Catz American*, 292 F.Supp. at 553; *see Goel*, 274 F.3d at 999 (noting that the only issues on an appeal of a Rule 60(b) motion are the propriety of the denial of relief and whether the district court abused its discretion in denying relief).

contends that the Indonesian court's annulment is a defense to enforcement under the New York Convention. KBC responds that Indonesia cannot be a proper forum for annulment because Switzerland is the country of primary jurisdiction.

Pertamina argues that the New York Convention permits more than one country to have primary jurisdiction over an arbitration award. Pertamina contends that the Convention's language permitting annulment by a court in "the country in which, or under the law of which, that award was made" allows for two potential primary jurisdiction countries--the country who hosted the arbitration proceeding, and the country whose arbitral procedural law governed that proceeding.[121] Using this reasoning, Pertamina suggests that both Switzerland (the host country) and Indonesia (the country of governing law) have primary jurisdiction over the arbitration in this case.

Pertamina correctly observes that the Convention provides two tests for determining which country has primary jurisdiction over an arbitration award: a country in which an award is made, and a country under the law of which an award is made.[122] The New York Convention suggests the

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[121] The language, "'the competent authority of the country . . . under the law of which, that award was made' refers exclusively to procedural and not substantive law, and more precisely, to the regimen or scheme of arbitral procedural law under which the arbitration was conducted, and not the substantive law . . . applied in the case." *Int'l Standard Elec. Corp.*, 745 F.Supp. at 178; *see Alghanim*, 126 F.3d at 21; *M & C Corp.*, 87 F.3d at 848.

[122] 9 U.S.C. § 201, Art. V(1)(e).

potential for more than one country of primary jurisdiction. Courts and scholars have noted as much.[123] Pertamina cites one such scholar as support for its position:

> [A]mbiguity is derived from the fact that the formula does not indicate whether the party seeking the annulment of the award must choose between the court at the seat of the arbitration and the one located in the country under the law of which the award is made—if the two are distinct—or whether it may seek annulment jointly or alternatively before both courts. . . . Article V(1)(e) of the New York Convention could [ ] be construed as referring to the courts of only one country while giving the party seeking the annulment the possibility to choose between the two countries should the two be distinct.[124]

Although an arbitration agreement may make more than one country eligible for primary jurisdiction under the New York Convention, the predominant view is that the Convention permits only one in any given case.[125] "[M]any commentators and foreign courts have concluded that an action to set aside an award can be brought *only* under the

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[123] *See, e.g., Int'l Standard Electric Corp.*, 745 F.Supp. at 177 (quoting Albert Jan van den Berg, *The New York Arbitration Convention of 1958* 350 (Kluwer 1981)); Paul Sanders *The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 6 Netherlands Int'l L.Rev. 43, 56 (1956).

[124] Hamid G. Gharavi, *The International Effectiveness of the Annulment of An Arbitral Award* (2002).

[125] "The reality, however, seems o be that the Article V(1)(e) formula enables enforcement courts to refuseenforcement of an award annulled by the competent court of the country n which the award was made even if (i) the award was rendered pursuan to the laws of a third State and (ii) annulment proceedings were pendng before the court of the country under the law of which the award was made." *Id.*

domestic law of the arbitral forum."[126] Pertamina's expert on international arbitration filed a report in the district court, stating that "there can be only one country in which the courts have jurisdiction over an annulment."[127] In its motion to the district court to set aside judgment under Rule 60(b), Pertamina conceded that "[a] primary jurisdiction has exclusive authority to nullify an award on the basis of its own arbitration law." Such "exclusive" primary jurisdiction in the courts of a single country is consistent with the New York Convention's purpose; facilitates the "orderliness and

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[126] *Alghanim*, 126 F.3d at 22 (citing commentary that the country of origin of the award is the only country with primary jurisdiction).

[127] Supplemental Expert Report of Albert Jan van den Berg, p. 20. Others agree. Professor Paul Sanders concludes that regardless of any ambiguity, Article V(1)(e) grants primary jurisdiction to the courts of only a single country:

> [T]he suspension must have been ordered by or the application for suspension must have been made to a "competent authority of the country in which, or under the law of which, that award was made." Here only one competent authority is meant; either the Court of the country where the award was made, or the Court of the country under the law of which the award was made. These last words were added on a Russian proposal to cover the case that an award has been made f.i. in Germany under French procedural law. In that case the suspension . . . according to the Convention should have to be demanded in France and not in Germany.

Sanders, *New York Convention* at 56. In his expert report for KBC, Professor Allen Scott Rau emphasized that "there is *only one national court system that has jurisdiction to consider an application for annulment of an award.*" Scholar Jan Paulsson submits "the fact is that setting aside awards under the New York Convention can take place only in the country in which the award was made." *The Role of Swedish Courts in Transnational Commercial Arbitration*, 21 Va. J. Int'l L. 211, 242 (1981).

predictability" necessary to international commercial agreements; and implements the parties' choice of a neutral forum.[128]

In this case, both of the New York Convention criteria for the country with primary jurisdiction point to Switzerland—and only to Switzerland.[129] The Award was made in Switzerland and was made under Swiss procedural law. The parties' arbitration agreement designated Switzerland as the site for the arbitration. This designation presumptively designated Swiss procedural law as the *lex arbitri*, in the absence of any express statement making another country's procedural law applicable.

Pertamina's own conduct during and after the arbitration evidences its intent to have Swiss procedural law apply and to have Switzerland be the country of primary jurisdiction over the Award. During the arbitration, Pertamina asserted that Swiss procedural law applied. When it lost the arbitration,

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[128] For example, "having a double test, *i.e.* that of the place of arbitration and that of the law governing the arbitration, can give rise to discrepancies." Andreas Bucher and Pierre-Yves Tschanz, *International Arbitration in Switzerland* 164 (1988). As one source has explained:

> For instance, the Federal Republic of Germany does not define German awards as awards made in Germany but as awards governed by German law wherever they are made. As a result, an award purporting to be made in Switzerland under German arbitration law is considered as a Swiss award in Switzerland and as a German award in Germany, with the result that such award could be challenged in both countries. In the reverse situation of an award made in Germany purportedly under Swiss arbitration law, such award is considered as Swiss in Germany and as German in Switzerland (since the place of arbitration is in Germany). As a result, such an award cannot be challenged in either country, but can only be recognized (or denied recognition) under the New York Convention.

Id.

[129] *See Alghanim*, 126 F.3d at 21; *M & C Corp.*, 87 F.3d at 848.

Pertamina asked the Swiss court to set aside the Award, acknowledging that the Swiss courts had primary jurisdiction. While that appeal was pending, Pertamina urged the district court in the enforcement proceeding that the Swiss court had exclusive primary jurisdiction–until the Swiss courts rejected Pertamina's appeal.[130]

Under the New York Convention, the parties' arbitration agreement, and this record, Switzerland had primary jurisdiction over the Award.[131] Because Indonesia did not have primary jurisdiction to set aside the Award, this court affirms the district court's conclusion that the Indonesian court's annulment ruling is not a defense to enforcement under the New York Convention.

III. Conclusion

Pertamina's challenges to the district court's decision affirming the Award are without merit. The summary judgment enforcing the Award is AFFIRMED.

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[130] The district court found that Pertamina "specifically, repeatedly and unequivocally" argued that Swiss arbitration law applied in the arbitration. *See* note 24.

[131] The Hong Kong court enforced the Award after the Indonesian court issued its annulment ruling, stating that "the fact that the court in Indonesia has now annulled the award under its own law is also a matter which has no effect on this court's task." *Hong Kong decision* at 12.

APPENDIX B

UNITED STATES DISTRICT COURT,
S.D. TEXAS,
HOUSTON DIVISION

No. CIV.A.H 01-0634

IN THE MATTER OF AN ARBITRATION BETWEEN
KARAHA BODAS COMPANY, L.L.C.,
Petitioner,

v.

PERUSAHAAN PERTAMBANGAN MINYAK
DAN GAS BUMI NEGARA
Respondent.

Dec. 4, 2001

MEMORANDUM AND ORDER

ATLAS, *District Judge*.

This action to enforce an international arbitral award is before the Court on Petitioner Karaha Bodas Company, L.L.C.'s Motion for Summary Judgment Confirming Arbitral Award ("KBC's Motion") [Doc. # 14] to which Respondent Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina") has responded.[1] Having reviewed the parties'

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[1] KBC also filed a Memorandum in Support of its Motion for Summary Judgment Confirming Arbitral Award [Doc. # 16] ("KBC's Memo randum"). Pertamina filed its Memorandum in Opposition to KBC's Motion for Summary Judgment ("Pertamina's Response") [Doc. # 29]. In addition, KBC filed a Reply [Doc. # 34] and Pertamina filed a Sur-reply [Doc. # 40]. PT. PLN (Persero) ("PLN"), was a Respondent at the arbitration and was originally named as a Respondent in this action. PLN was

briefs, all matters of record and the applicable authorities, the Court concludes that KBC's Motion should be **granted**.

I. BACKGROUND FACTS

KBC is a Cayman Islands limited liability company that contracted to develop the 400 MW Karaha Bodas Geothermal Project (the "Project") in West Java, Indonesia. Pertamina is an oil and gas corporation owned by the Government of the Republic of Indonesia and entrusted with the exploration and exploitation of geothermal resources and generation of electricity in Indonesia. PLN is a state-owned electric utility that supplies public electricity in Indonesia.

A. *The Project*

On November 28, 1994, Pertamina, PLN, and KBC entered into two contracts to establish their roles and obligations in the Project. Pursuant to the Joint Operations Contract ("JOC") between KBC and Pertamina, Pertamina was responsible for management of the geothermal operations and KBC was designated the contractor responsible for financing the Project and building, owning, and operating the generating facilities. *See* Petitioner's Exhibit ("PX") 2, JOC. The Energy Sales Contract ("ESC") among KBC, Pertamina, and PLN, obligated PLN to purchase from Pertamina the electricity generated by KBC's facilities for specified prices. *See* PX 3, ESC.

In almost identical provisions, both the JOC and the ESC required the parties to arbitrate any disputes in Geneva, Switzerland, pursuant to the Arbitral Rules of the United Nations Commission on International Trade Law (the "UNCITRAL Rules"). *See* JOC, Art. 13.2(a); ESC, § 8.2(a), at 18. Additionally, the arbitration provisions required the

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not served and has been dismissed from this case, [*see* Doc. # 44], pursuant to KBC's Notice of Dismissal [Doc. # 43].

parties to appoint arbitrators within thirty days of a party's request to initiate arbitration. The JOC provided that "[e]ach party will appoint an arbitrator," while the ESC specified that "PLN on one hand, and COMPANY [KBC] and PERTAMINA on the other hand, will each appoint one arbitrator." *Id.* In the event that an arbitrator was not selected within this thirty-day time frame, both contracts provided that an arbitrator would, by default, be appointed by the Secretary General of the International Center for Settlement of Investment Disputes ("ICSID") upon the request of any party. *Id.* The JOC and the ESC also contained virtually identical provisions limiting the parties' rights to appeal or otherwise bring legal proceedings concerning a dispute subject to the arbitration provisions. JOC, Art. 13.2(d); ESC, § 8.2(d), at 19.

The Government of Indonesia issued a Presidential Decree dated September 20, 1997 indefinitely postponing the Project. However, KBC continued development of the project based on Pertamina's and PLN's assurances that the Project suspension was temporary and would be restored. The Project was restored briefly by a Presidential Decree dated November 1, 1997, but yet another Presidential Decree dated January 10, 1998 (the "Presidential Decree") confirmed the indefinite postponement of the Project. As a result, Pertamina and PLN did not fulfill their contractual obligations to purchase the energy to be generated by KBC's facilities. In February 1998, KBC gave Pertamina and PLN notice that the Presidential Decree constituted an event of *Force Majeure* under both the JOC and the ESC. On April 30, 1998, KBC served its Notice for Arbitration.

B. *The Arbitration Proceedings*

In the Notice of Arbitration, KBC appointed Professor Piero Bernardini[2] to serve as an arbitrator. Pertamina, how-

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[2] Prof. Bernardini was at the time Vice Chairman of the International Chamber of Commerce's International Court of Arbitration ("ICC") and

ever, did not designate an arbitrator in the allotted time of thirty days or thereafter. Nor did Pertamina contest KBC's selection at that time. By letter dated June 2, 1998, KBC notified the ICSID of Pertamina's inaction and requested the appointment of a second arbitrator pursuant to the default appointment provisions of the contracts. *See* PX 8. The ICSID questioned KBC concerning the consolidation of disputes under the JOC and the ESC and KBC's unilateral appointment of an arbitrator, and KBC responded by letter dated June 22, 1998. *See* PX 10. The ICSID confirmed receipt of the June 2 and June 22 letters. PX 11. In a June 29, 1998 letter to all parties, the ICSID recapped the prior correspondence, noted Respondents' failure to respond, and expressed its intent to grant KBC's request to appoint the second arbitrator. *See* PX 12. The ICSID also provided to the parties at this time the name of Dr. Ahmed El-Kosheri and his accompanying curriculum vitae,[3] and requested that any objections to the appointee be proffered by July 13, 1998. The ICSID sent all the preceding correspondence to PLN by courier and to Pertamina by fax and courier. *See* PX 15. Respondents did not object or respond to the potential appointment.[4] On July 13, 1998, having received no communications from Respondents, the ICSID notified them of its intent to appoint Dr. El-Kosheri, *see* PX 16, and made the appointment on July 15, 1998, copying all parties, *see* PX 17. Dr. El-Kosheri accepted the nomination on July 16, 1998. *See*

Member of the London Court of International Arbitration. KBC's Memorandum, at 6-7.

[3] Dr. El-Kosheri was also a Vice Chairman of the ICC. KBC's Memorandum, at 7.

[4] KBC responded to the ICSID on July 1, 1998 (with copy to Respondents) that it had no objection to the appointment of Dr. El- Kosheri. *See* PX 13. The ICSID confirmed receipt of KBC's correspondence on July 2, with copies to Respondents. *See* PX 14. On July 10, the ICSID again forwarded the correspondence to Pertamina. *See* PX 15.

PX 18. Pursuant to the JOC and the ESC, the two appointed arbitrators selected Mr. Yves Derains as Chairman of the arbitration panel (the "Tribunal"), and duly notified the parties. *See* PX 19.

Before proceeding on the merits of the case, PLN requested that the Tribunal first consider certain preliminary issues. *See* PX 21. The Tribunal heard the parties on these preliminary issues on November 19, 1998. Following the hearing, PLN and Pertamina, represented jointly by the same lawyers, submitted a joint memorial, *i.e.*, a memorandum, contending that KBC had improperly attempted to consolidate claims against different parties arising under separate agreements or putative agreements and that the Tribunal had been improperly constituted as the result of (1) the nature of a multi-party arbitration and (2) KBC's failure to honor the arbitrator nomination provisions of the ESC. *See* PX 23, Respondents' Memorial Regarding Preliminary Issues. Respondents participated in further argument on their preliminary objections at a hearing on May 31, 1999.

On October 4, 1999, the Tribunal issued a unanimous Preliminary Award, which held, in pertinent part, that: (1) the Tribunal was properly constituted; (2) KBC was entitled to file its claims, based on the JOC and the ESC, in a single arbitration; and (3) the Government of Indonesia was not a proper party to the arbitration. *See* PX 28, Preliminary Award, at 34.

KBC, after a brief extension of time, filed its Revised Statement of Claim on November 24, 1999. Thereafter, Pertamina and PLN sought, and were granted, a series of extensions to file a response to KBC's Revised Statement of Claim. The Tribunal also granted Respondents' March 6, 2000 joint request for a further extension to accommodate their change of counsel. Ultimately, pursuant to an agreement of the parties that was memorialized in Procedural Order No. 4, KBC filed a Revised Statement of Claim and

First Memorial supplementing its claims on November 24, 1999; Respondents submitted a Reply and First Memorial on April 7, 2000; KBC submitted a Rebuttal and Second Memorial ("Rebuttal") on May 8, 2000; and Respondents submitted a Rejoinder to KBC's Rebuttal and Second Memorial on June 9, 2000. Procedural Order No. 4 set the hearing on the merits for June 19 through June 30, 2000. *See* PX 38.

Pertamina and PLN sought a further continuance and additional discovery after being served with KBC's Rebuttal, which they claimed contained new assertions and "significant elements of its case in chief" that had not previously been revealed. The Tribunal denied their requests. Further, the Tribunal determined that any adjustment to the proceedings, that could be necessary, would be decided at the end of the hearing. PX 57.

The hearing on the merits began June 19, 2000 and closed on June 23, 2000. The hearing resulted in a transcript of over 800 pages reflecting extensive argument of counsel and live testimony from seven witnesses. Written witness statements were also submitted by the parties. The Tribunal noted that at the conclusion of the hearing, counsel "declared that they waived their respective requests for discovery," and confirmed that they had no objection beyond those already stated as to the conduct of the proceedings. PX 71, Final Award, at 12; *see* Transcript of Arbitration, Vol. V, at 807-08, 814. Post-hearing briefs were submitted on August 7, 2000. PX 71, Final Award, at 13.

On December 18, 2000, the Tribunal issued its Final Award which held that Pertamina and PLN had breached the ESC and that Pertamina had breached the JOC. *Id.* at 24, 47. The Tribunal reasoned that Respondents contractually assumed the risk of the harm created by the Presidential Decree. *Id.* at 19-20. Further, the Tribunal awarded KBC $111,100,000 to recoup its expenditures on the Project, $150,000,000 in future lost profits, and $66,654.92 in costs

and expenses, plus four percent interest from January 1, 2001, until the date of full payment. *Id.* at 47.

KBC seeks enforcement of the Final Award in this proceeding pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958 ("New York Convention"), codified at 9 U.S.C. § 201 *et seq.*

II. STANDARD OF REVIEW

The parties agree that the recognition and confirmation of international arbitral awards is governed by the New York Convention. *See* 9 U.S.C. § 201; *Schlumberger Tech. Corp. v. United States*, 195 F.3d 216, 217 (5th Cir.1999). "The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries." *Imperial Ethiopian Gov't v. Baruch-Foster Corp.*, 535 F.2d 334, 335 (5th Cir.1976) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974)). The New York Convention is formally incorporated into United States law through implementing legislation found at 9 U.S.C. §§ 201-208.

In keeping with the expeditious nature of arbitration, this implementing legislation provides for a "summary procedure" for enforcement of foreign arbitral awards. *Imperial Ethiopian Gov't*, 535 F.2d at 335. Permissible defenses are few and "the court *shall confirm* the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." 9 U.S.C. § 207 (emphasis added); *Imperial Ethiopian Gov't*, 535 F.2d at 335-36. The defenses specified in the Convention are narrowly construed to give effect to the Convention's goal of encouraging the timely and efficient enforcement of

awards. *In re Arbitration Between Trans Chem. Ltd. and China Nat'l Mach. Import and Export Corp.*, 978 F. Supp. 266, 310 (S.D.Tex.1997), *aff'd*, 161 F.3d 314 (5th Cir.1998). In short, there is a "general pro-enforcement bias" manifested in the Convention. *American Const. Mach. & Equip. Corp. v. Mechanised Const. Of Pakistan, Ltd.*, 659 F. Supp. 426, 428 (S.D.N.Y. 1987).

The New York convention contains only seven possible defenses. 9 U.S.C. § 201, Art. V. Recognition and enforcement of the award may be refused if the losing party furnishes proof that: (a) the parties to the agreement were under some incapacity or the agreement was invalid under the law to which the parties have subjected it; (b) the party against whom the award was invoked was not given proper notice of the appointment of the arbitrator, the arbitration proceedings, or was otherwise unable to present his case; (c) the final award deals with a difference not contemplated by the submission to arbitration or is beyond the scope of the submission to arbitration; (d) the composition of the arbitral authority or the arbitral procedure was improper and not in accordance with the agreement of the parties; or (e) the award has not yet become binding or has been stayed by a competent authority. *Id.*, Art. V(1). A court also may refuse confirmation on a arbitral award if it finds (a) the subject matter of the difference between the parties is not capable of settlement by arbitration under the law of the enforcing state or (b) enforcement of the award is or would be contrary to the public policy of the enforcing state. *Id.*, Art. V(2).

Although it is necessary for the Court to analyze potential New York Convention defenses raised by Pertamina, "[a]bsent extraordinary circumstances, a confirming court is not to reconsider the arbitrator's findings." *Europcar Italia v. Maiellano Tours*, 156 F.3d 310, 315 (2d Cir. 1998). A mistake in fact or law is insufficient to refuse confirmation of an arbitral award. *Id.* at 316.

The burden of proof in confirmation proceedings rests on the party defending against enforcement of the arbitral award, in this case, Pertamina. *Imperial Ethiopian Gov't*, 535 F.2d at 336; *Empresa Constructora Contex Limitada v. Iseki, Inc.*, 106 F. Supp. 2d 1020, 1024 (S.D. Cal. 2000); *American Const. Mach. & Equip. Corp.*, 659 F. Supp. at 428.

III. CONTRACTUAL WAIVER OF OPPOSITION TO ENFORCEMENT

As a threshold matter, the Court must determine whether Pertamina agreed in the JOC or ESC to forgo any defense against enforcement of the arbitration award. KBC contends that the following language, present in both contracts, prohibits Pertamina from opposing KBC's enforcement action:

> The award rendered in any arbitration commenced hereunder shall be final and binding upon the Parties and judgment thereon may be entered in any court having jurisdiction for its enforcement. The Parties hereby renounce their right to appeal from the decision of the arbitral panel and agree that in accordance with Section 641 of the Indonesian Code of Civil Procedure neither Party shall appeal to any court from the decision of the arbitral panel and accordingly the Parties hereby waive the applicability of Articles 15 and 108 of Law No. 1 of 1950 and any other provision of Indonesian Law and regulations that would otherwise give the right to appeal the decision of the arbitral panel. In addition, the Parties agree that neither Party shall have any right to commence or maintain any suit or legal proceeding concerning a dispute [hereunder until the dispute[5]] has been determined in accordance with the arbitration procedure provided for herein and then only to enforce or facilitate the execution of the award rendered in such arbitration.

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[5] The bracketed text inexplicably is absent from the JOC, but the omission does not affect the meaning.

JOC, Art. 13(d); ESC, § 8(d). Pertamina contends that this provision does not constitute a waiver of its rights under the New York Convention.

Neither party has cited a case analyzing language precisely like that in the contracts at issue here. KBC relies on *In re Arbitration Between Chromalloy Aeroservices and Arab Repub. of Egypt*, 939 F. Supp. 907 (D.D.C. 1996). However, the holding in that case is not precisely on point. In that case, the United States District Court for the District of Columbia found that an Egyptian ruling nullifying an arbitration award was improper because it was "the clear intent of the parties that any arbitration of a dispute arising under the Contract is not to be appealed to any court." *Id.* at 912. While *Chromalloy* supports the conclusion that language such as that quoted above constitutes a waiver of Pertamina's right to appeal the arbitration award, the current proceeding is not an appeal but an enforcement action. *Chromalloy* did not address the affect of such language on a party's right to raise New York Convention defenses in opposition to an enforcement proceeding.

Pertamina cites *M & C Corp. v. Erwin Behr GmbH & Co.*, 87 F.3d 844, 847 (6th Cir. 1996), for the proposition that the contract provisions quoted above do not constitute a waiver of its defenses under the New York Convention. The contract at issue in *M & C Corp.*, provided that "[t]he arbitral award shall be final" and that the parties have "waived their right to any form of appeal." *Id.* The *M & C Corp.* court determined that notwithstanding the contractual language at issue in that case, the party against whom the award was rendered was entitled to contest the validity and enforceability of the award pursuant to the New York Convention. *Id.* The Sixth Circuit was concerned that to hold otherwise "would insulate [arbitration] judgments from judicial review even in cases involving fraud, procedural irregularities, or exertion of improper influence upon arbitrators." *Id.*

The contractual provisions at issue here are broader than the one in *M & C Corp.* in that they limit not only appeals but the "right to commence or maintain any suit or legal proceeding concerning a dispute hereunder." The Court nevertheless concludes that Pertamina is entitled to rulings on the arguments it raises. The present suit is one in which KBC seeks to enforce an arbitration award which Pertamina opposes. The necessity of a suit to enforce the award was envisioned by the drafters of the JOC and ESC. Implicitly, the parties thus recognized the right to defend against such relief under the New York Convention. Had the drafters intended to deprive an unsuccessful party of all New York Convention defenses in an enforcement proceeding, the drafters could and should explicitly have said so.

The defenses permitted by the New York Convention ensure that arbitral awards meet minimum procedural standards for protecting the litigants' rights. The defenses recognized by the New York Convention do not permit the Court to address the merits of the dispute submitted to arbitration. *See Schlumberger*, 195 F.3d at 220. The Court concludes that Pertamina has not waived its New York Convention defenses to enforcement of the arbitral award. Thus, the Court will consider the substantive points raised by Pertamina's Response.

IV. PERTAMINA'S NEW YORK CONVENTION DEFENSES

Article V of the New York Convention specifies seven limited exceptions to the mandatory enforcement of foreign arbitration awards. "Absent a convincing showing that one of these narrow exceptions applies the arbitral award will be confirmed." *Trans Chem.*, 978 F. Supp. at 309; *see Yusuf Ahmed Alghanim & Sons v. Toys "R" Us*, 126 F.3d 15, 20 (2d Cir.1997). Pertamina asserts three of the enumerated New York Convention defenses here: (1) the composition and procedure of the Tribunal violated the terms of the parties'

agreements (Art. V(1)(d)); (2) the Tribunal deprived Pertamina of due process (Art. V(1)(b)); and (3) the arbitral award violates public policy (Art. V(2)(b)).

A. *Alleged Violations of the Parties' Agreements*

Article V, § 1(d) of the Convention provides a defense against confirmation of an arbitral award if the respondent can prove that "the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place." 9 U.S.C. § 201, Art. V(1)(d). At least one district court faced with an objection to enforcement of an arbitral award based on Article V(1)(d) has concluded that because of the clear "pro-enforcement bias" of the New York Convention, it is appropriate to "set aside an award based on a procedural violation only if such violation worked substantial prejudice to the complaining party." *Compagnie Des Bauxites De Guinee v. Hammermills, Inc.*, No. 90-0169, 1992 WL 122712, *5 (D.D.C. May 29, 1992); *American Const. Mach. & Equip. Corp.*, 659 F. Supp. at 428. The Court finds the *Hammermills* decision well-reasoned and adopts it as persuasive authority. The Court therefore holds that Pertamina must show that there is a violation of an arbitration agreement between the parties and that the violation actually caused Pertamina substantial prejudice in the arbitration.

Pertamina argues that the Final Award should not be confirmed because first, the Tribunal improperly consolidated the disputes under the JOC and ESC into one arbitral proceeding and, second, the Tribunal was improperly constituted because KBC unilaterally chose an arbitrator in violation of the terms of § 8.2 of the ESC.[6]

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[6] KBC characterizes Pertamina's arguments as "arbitrability" issues, and argues that Pertamina cannot raise such issues here because it agreed

1. Consolidation of KBC's Claims Under the JOC and ESC

Pertamina argues that the arbitral procedure was contrary to the parties' agreements because neither the JOC or the ESC expressly allows consolidation. Because arbitration is a product of contract, courts generally are reluctant to allow consolidation unless the parties consent. *See United Kingdom of Great Britain v. Boeing Co.*, 998 F.2d 68, 72 (2d Cir. 1993) (district courts do not have authority to consolidate arbitrations absent the parties consent).

In this case, the Tribunal approved a single arbitration based on the "connexity" of KBC's claims and the integration of the two contracts.[7] *See* PX 28, Preliminary Award, at 26. The Tribunal found that "the parties did not contemplate the performance of two independent contracts, but the performance of a single project consisting of two closely related parties." *Id.* at 27. The Tribunal had "not the slightest doubt" that a single arbitration was appropriate due to the integration of the two contracts and the fact that the Presidential Decree, the consequences of which are at the origin of the dispute, affected both of them. *Id. Compare United Kingdom*, 998 F.2d at 69 (reversing district court consolidation of arbitration proceedings involving separate, distinct agreements between the United Kingdom and two different parties, absent the parties' agreement).

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to submit them for decision by the Tribunal. The Court disagrees. Disputes concerning breaches of the contracts are encompassed by the contracts' arbitration clauses. To the extent that Pertamina raises issues as to whether the arbitration procedures were in accordance with the parties' agreements, these matters are not strictly arbitrability questions. However, KBC's contention that these contract issues were fully aired before the Tribunal is well-taken. Absent some clear reason under the New York Convention, the Court will enforce the Tribunal's award.

[7] "Connexity," as explained in the Preliminary Award, relates to the legal relations between KBC and Pertamina on the basis of the JOC on the one hand, and between KBC, Pertamina and PLN on the basis of the ESC on the other hand. PX 28, Preliminary Award, at 26.

The Tribunal based its integration finding on the facts that the contracts were signed on the same day; that the JOC expressly provided that the ESC "shall be an integral part of this contract, and to the extent the provisions of the Energy Sales Contract obligate the Parties hereto, shall be deemed incorporated into this contract for all purposes"; and that the ESC provided that it and the JOC together constitute the entire agreement between the parties. PX 28, Preliminary Award, at 26-27. In essence, the Tribunal concluded that the nature of the contracts at issue is such that the parties contemplated arbitration in a single proceeding. This Court strongly concurs. In addition, it is obvious that separate arbitrations of the matters in dispute among the parties under the JOC and ESC would have required substantial duplication of evidence on liability, damages and defensive issues. Pertamina, the only Respondent in this enforcement proceeding,[8] is a party to both the JOC and the ESC. The two Respondents in the arbitration, Pertamina and PLN, were represented by the same counsel at all times during the arbitration. Further, Pertamina has not cited any case in which consolidation was deemed to be in error under similar circumstances.[9]

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[8] *See supra* note 1.

[9] One treatise, cited by Pertamina in support of its argument that there can be no consolidation absent consent, acknowledges "there is strong support for the view that a judicially consolidated arbitration would be enforceable under the New York Convention where allowed by the governing local law as long as all parties have agreed (1) to arbitration and (ii) [sic] to the same arbitral jurisdiction. Where the parties have in effect agreed to a *lex arbitri*, it is reasonable to infer that they have agreed to be governed by any mandatory requirements of that law regarding consolidation which may override the express choice of the parties in matters of composition and procedure of the arbitral tribunal." ALLAN REDFERN, MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 187 (2d Ed.1991). In this case, the parties agreed to arbitration and that the arbitration would be conducted in Geneva, Switzerland. Thus, there is a legal foundation for the Tribunal's application of the Swiss law of "connexity" to the consolidation issue.

The Tribunal acknowledged that "the position of each party has to be considered independently when discussing the substance of the case, on the basis of their respective legal and contractual situations" (*Id.* at 28), and carefully adhered to this precept in all its rulings. There is no evidence that the Tribunal failed to distinguish between the positions of Pertamina and PLN in the arbitration. Indeed, the Tribunal went to great lengths to address the contentions of each separately, even though Pertamina and PLN chose to submit joint memorials and were represented by the same counsel at the arbitration hearing. There is simply no showing that these findings by the Tribunal are in error and should not be enforced.

In any event, Pertamina has not demonstrated that it suffered any loss of contract rights from the consolidation. The Court concludes that the consolidation did not violate the parties' agreements. Pertamina has not proven any prejudice from the consolidation. Pertamina thus has failed to meet its burden under the New York Convention to show a violation of Article V(1)(d) that precludes enforcement of the Final Award.

2. Appointment of Arbitrators

Pertamina also contends that the procedure used to appoint the arbitrators for the arbitration proceedings violated the ESC.

The ESC provides for the appointment of arbitrators as follows:

> PLN on one hand, and COMPANY [KBC] and PERTAMINA, on the other hand, will each appoint one arbitrator, in each case within thirty (30) days after the date of a request to initiate arbitration, who will then jointly appoint a third arbitrator within thirty (30) days of the date of the appointment of the second arbitrator, to act as Chairman of the Tribunal. Arbitrators not ap-

> pointed within the time limits set forth in the preceding sentence shall be appointed by the Secretary General of the International Center for Settlement of Investment Disputes, upon the request of any Party.

ESC, § 8.2(a). The JOC's procedure for arbitrators' appointment is slightly different:

> Each Party [KBC and Pertamina] will appoint an arbitrator within thirty (30) days after the date of a request to initiate arbitration, who will then jointly appoint a third arbitrator within thirty (30) days of the date of the appointment of the second arbitrator, to act as Chairman of the Tribunal. Arbitrators not appointed within the time limits set forth in the preceding sentence shall be appointed by the Secretary General of the International Center for Settlement of Investment Disputes.

JOC, Art. 13.2(a). Thus, each contract provided for the appointment of arbitrators by the ICSID in the event any party failed to meet its own obligation to do so. There is no question that the Tribunal was constituted in accordance with the express terms of the JOC. The disputed issue is whether KBC's unilateral designation of the first arbitrator violated the ESC.

The Tribunal rejected the Respondent's position that in all disputes under the ESC, KBC *and* Pertamina must jointly appoint one arbitrator while PLN appointed the other. *See* PX 28, Preliminary Award, at 30. The Tribunal found that the ESC arbitration clause applies to the entire contract, not only to disputes aligning KBC and Pertamina on one side against PLN, and that therefore it defied common sense, in a dispute between KBC and Pertamina, to oblige KBC and Pertamina to jointly appoint an arbitrator. *See id.* Because the ESC does not expressly address the method for appointing arbitrators in the *KBC v. Pertamina* situation, the Tribunal found that the appointment of arbitrators must be made in accordance with UNCITRAL Arbitration Rules, which the

parties incorporated into the ESC and which were satisfied in this case.[10] To the extent that the contract interpretation issue is an arbitrable one, the Court sees no reason under the New York Convention to reject the Tribunal's reasoned analysis of the ESC.

In addition, looking at the issue afresh, the Court concludes that Pertamina has not established a violation of the ESC in regard to the first (or any other) arbitrator's selection. Pertamina has not claimed, before the Tribunal or this Court, that it failed to receive KBC's April 30, 1998 Notice of Arbitration. That Notice included Prof. Bernardini as KBC's choice of arbitrator. Pertamina also has not claimed that it did not receive the ICSID's June 29 and July 13, 1998 letters, *see supra*, at 4, informing Pertamina of the ICSID's intention to appoint Dr. El-Kosheri as the second arbitrator.[11] The ICSID's action thus also indicated its acceptance of Prof. Bernardini as the first arbitrator. Nonetheless, Pertamina lodged no objection to the appointment of either Prof. Bernardini or Dr. El-Kosheri.[12]

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[10] Section 8.2(a) of the ESC provides that any dispute arising under that contract "shall finally be settled by an arbitral tribunal (the "Tribunal") under the UNCITRAL arbitration rules contained in Resolution 31/98 adopted by the United Nations General Assembly on December 15, 1976 and entitled 'Arbitration Rules of the United Nations Commission on International Trade Law' as in force at the time such arbitration commenced."

[11] Pertamina apparently argued to the Tribunal that it did not name an arbitrator because it was contesting the legitimacy of the arbitration and further contended that it did not receive certain of the correspondence from the ICSID regarding KBC's request that the ICSID appoint the second arbitrator. *See* PX 28, Preliminary Award, at 8. Pertamina does not assert these arguments before the Court.

[12] In fact, Pertamina expressly informed the Tribunal in its Preliminary Memorial that it had no objection to Dr. El-Kosheri, the arbitrator selected by the ICSID. *See* PX 23, at 36. Thus, Pertamina's objection is solely to [sic] fact that KBC was allowed to select one of the arbitrators.

The Court also rejects Pertamina's contention that KBC's nomination of an arbitrator without Pertamina's consent violates the ESC because Pertamina's construction of the selection procedure renders the ESC's arbitration provision illusory. Under Pertamina's interpretation, Pertamina would hold the unilateral power to prevent the arbitration of disputes between it and KBC arising under the ESC simply by refusing to select or comment on KBC's proposals for an arbitrator. That is not a reasonable interpretation of the expressed intent of the parties as set forth in the ESC. The parties intended that in the event a party failed to name an arbitrator within thirty days of the request for arbitration, the ICSID would do so. In effect, that is the scenario that transpired in this case. KBC nominated an arbitrator. Pertamina had ample notice of this act. The time for Pertamina to object to KBC's selection or for Pertamina to have asserted its right to participate in the first arbitrator's appointment was within thirty days of receiving KBC's Notice of Arbitration and arbitrator selection. In the absence of an objection from Pertamina, nothing in the ESC precluded the ICSID from accepting KBC's nomination for the first arbitrator.[13] This procedure materially complies with the terms of the ESC.[14]

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[13] It is noted that Pertamina still lodged no objection to either the first or the second individual appointed arbitrator.

[14] There are other viable interpretations of the ESC arbitration clause and the parties' contracts generally that support the procedure used in this dispute. For instance, because the ESC and JOC are expressly integrated contracts, they must be interpreted together to determine the intent of the parties. It is arguable that the parties to the ESC intended to be bound by the arbitration provision (including the provision for the selection of arbitrators) of the JOC when a dispute involved that contract. Under that interpretation, the arbitration provision of the ESC would be operative only in the event the arbitration did not include issues arising under the JOC. Alternatively, the contract provisions may be harmonized by applying the ESC methodology only when KBC and Pertamina both were adverse to PLN and not to each other.

Pertamina's belated arguments that Prof. Bernardini was improperly selected are a futile attempt to avoid consequences of its strategic decisions not to object timely to KBC's selection and to decline to participate in the selection of an arbitrator.

Moreover, there is no evidence—and Pertamina does not even allege—that Prof. Bernardini, the KBC-selected arbitrator, was biased against Pertamina. Indeed, to the extent Pertamina must show prejudice from the contract violation to support this New York Convention defense, Pertamina's evidence fails even if one assumes that Prof. Bernardini unfairly favored KBC in the arbitration. All the findings and awards were unanimous. *See* PX 28, Preliminary Award; PX 71, Final Award. There is no evidence or even any allegation that the other two arbitrators were not neutral, were biased, or had any conflict of interest. Therefore, Pertamina cannot show that the arbitration selection procedure worked any prejudice to Pertamina. *See Compagnie des Bauxites de Guinee*, 1992 WL 122712, at *5.

The Court accordingly holds that Pertamina has not met its burden to show either that the composition of the Tribunal violated the parties' agreements or that the composition caused Pertamina substantial prejudice.

B. *Alleged Due Process Violations*

The New York Convention allows denial of award confirmation if the party against whom it is invoked can prove that it "was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case. [sic] 9 U.S.C. § 201, Art. V(1)(b). This enumerated defense "essentially sanctions the application of the forum state's standards of due process." *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 145-46 (2d Cir. 1992). The fundamental requirement of due process is the opportunity to be heard at a "meaningful time and in

meaningful manner." *Id.* at 146. Enforcement of the award may be denied only if there was a procedural infirmity that rendered the proceedings fundamentally unfair and caused prejudice to the complaining party. *Hammermills*, 1992 WL 122712, at *5. A fundamentally fair hearing is one that meets the minimum requirements of fairness: adequate notice, a hearing on the evidence, and an impartial decision by the arbitrators. *See Generica Ltd. v. Pharm. Basics*, 125 F.3d 1123, 1130 (7th Cir. 1997); *Sunshine Mining Co. v. United Steelworkers*, 823 F.2d 1289, 1295 (9th Cir. 1987). The right to due process does not, however, encompass the procedural rights guaranteed by the Federal Rules of Civil Procedure. *Imperial Ethiopian Government*, 535 F.2d at 337; *Empresa*, 106 F. Supp. 2d at 1026; *Trans Chem.*, 978 F. Supp. at 310 ("The right to due process does not include the complete set of procedural rights guaranteed by the Federal Rules of Civil Procedure. By agreeing to arbitration [the respondent] subjected itself to its advantages and disadvantages.").

Pertamina argues that it was not afforded due process in the arbitration because the Tribunal (1) failed to grant a continuance and denied it further discovery six weeks before the scheduled hearing, and (2) "reversed," without notification, the Preliminary Award. The first of these alleged procedural deficiencies relates to Pertamina's alleged inability to respond adequately to issues raised in KBC's Rebuttal briefing. In connection with its arguments regarding discovery, Pertamina further asserts that it is entitled to discovery in this federal court proceeding pursuant to Federal Rule of Civil Procedure 56(f) before the Court rules on KBC's summary judgment motion. The second alleged procedural deficiency relates to Pertamina's perception that the Final Award is contrary to the Tribunal's Preliminary Award, which found that the Government of Indonesia was not a proper party to the arbitration and that Pertamina could not be held liable for the acts of the Government of Indonesia. KBC contends that Pertamina received a full and fundamentally fair hearing.

1. Denial of Request for Continuance and Discovery

Tribunal's Denial of Continuance and Discovery Requests.—Six weeks before the hearing, in early May 2000, KBC filed a Rebuttal with the Tribunal. Pertamina contends that it was prejudiced by KBC's Rebuttal because KBC allegedly included an entirely new position on the financing of the Project, made new allegations of the conduct constituting Pertamina's breach, relied on newly-submitted awards in the arbitrations known as *Himpurna* and *Patuha*, identified additional witnesses, and presented new documentary evidence. Pertamina asserts that it was required to secure new experts and fact witnesses and to impose upon its existing experts and fact witnesses to review KBC's Rebuttal submissions in four weeks. Pertamina further contends it had insufficient time post-Rebuttal to prepare for the hearing.

In fact, KBC's Rebuttal did not assert any new claims or new legal theories for recovery. KBC's Rebuttal responded to specific defenses asserted in Respondents' Reply by specifying additional facts, argument, and authority supporting its claims, including the *Himpurna* and *Patuha* awards. The Court is aware of no rule or law that obligated KBC to specify in its Revised Statement of Claim all evidence it intended to submit, and every argument it intended to make, ultimately to support its claims at the hearing. Pertamina had notice of KBC's claims, and should have anticipated that KBC would contest its defenses. The arbitration proceeding was pending for approximately two years. Pertamina had ample time to prepare its case. Moreover, the fact that KBC's Rebuttal was submitted only six weeks before the hearing was the direct result of Respondents' requests for extensions of time to submit their Reply to KBC's November 1999 Revised Statement of Claim. Pertamina was aware in mid-March 2000, when the Tribunal granted its latest request for an extension of time, that the hearing date remained set for June 19, 2000. *See* PX 38, Procedural Order No. 4.

Pertamina did not file its Reply to KBC's Revised Statement of Claim until April 2000, which explains the timing of KBC's Rebuttal.

To the extent Pertamina also contends that it was unfairly denied discovery on the "highly material" issue of KBC's ability to finance the Project, the record does not support the contention. During the two years preceding the filing of the Rebuttal, Pertamina had requested no discovery on this "highly material" issue, even though KBC expressly sought lost profits in its Revised Statement of Claim in November, 1999, and even though Pertamina responded to KBC's claim by arguing that KBC was entitled to no damages because it could not have completed the Project for reasons independent of the Presidential Decree. *See* PX 40, at 6. Moreover, even without the requested discovery, Pertamina presented substantial evidence on the Indonesian economy (information easily accessible to Pertamina and PLN), and expert opinions on the availability of financing, on the size of the "geothermal reserve," and on the "useable resource." *See* PX 39, 41, 42, 43, and 44. Pertamina's counsel thoroughly cross-examined KBC's witnesses on the issues raised in KBC's Rebuttal. Pertamina, which bears the burden to prove that the hearing was fundamentally unfair, does not identify specific topics or other matters it was prevented from raising; nor does Pertamina identify anything it would have done differently if it had more preparation time. Pertamina refers to the broad, general discovery requests attached to its letter of submission to the arbitrators, *see* PX 54, but it has not identified a single specific piece or type of evidence it believes exists that would have aided in its defense on these issues. Pertamina has failed to establish under the New York Convention that it was denied a fundamentally fair hearing, and thus denied due

process, as a result of the lack of discovery or a continuance after KBC's Rebuttal.[15]

In addition, the transcript of the June 23, 2001 proceedings (the last day of the arbitration hearing) establishes that Respondents informed the Tribunal that they were satisfied with the record as it existed, and that they abandoned their pre-hearing discovery requests:

> MR. CHAIRMAN: May we, before departing have a discussion on what is going to be done now in these proceedings, and we see two items on this particular agenda. There were first a certain number of procedural objections which have been made before this hearing, and in the procedural order we said that this would be decided after the hearing. In summary, there was a request for discovery from one side, and there was objection to the submission of this arbitral award and the business of confidentiality. You remember this discussion.
> MR. MISHKIN [Respondents' Attorney]: I think there was a request for discovery from both sides.
> MR. CHAIRMAN: Our first question is are these requests maintained, all of them, part of them, because we would like to know on what we have to decide.
> MR. MISHKIN: May I just give you my views on that question.
> MR. CHAIRMAN: Yes.
> MR. MISHKIN: And that is that the purpose of discovery is to prepare for the hearing, it is not to supplement the record after the hearing. So I think the discovery requests are moot, and if discovery is now permitted, then you have to re-open the proceedings and so on. So I treated, notwithstanding the fact that it was theoretically open, I treated this request as effectively being

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[15] The issue is not whether this Court would have granted the discovery or the continuance. The question is whether the procedures employed met the minimum requirements of fairness.

> denied, and we went forward. Our request went to the purported financial ability, the purported financing that would have been made available and other things, and *I think the record on that has been fully made. I am prepared to rest on that record,* and so *I think discovery requests should no longer be in the picture.*
> MR. SCHILLER [Petitioner's Attorney]: I agree.
> PROF. BERNARDINI [Arbitrator]: And you agree on their withdrawing their request. What about yours?
> MR. SCHILLER: I withdraw my request.

Hearing Transcript, Vol. V, at 807-08 (emphasis added). Thus, Pertamina expressly abandoned its arguments concerning the timing and other alleged procedural defects in the arbitration proceedings.

In any event, these procedural decisions were well within the reasonable exercise of the Tribunal's discretion. These decisions did not prevent Pertamina from having a meaningful hearing. They do not rise to the level of fundamental unfairness necessary to deny enforcement of the arbitration award.

Pertamina's Rule 56(f) Request for Discovery.—As another avenue in its due process defense under the New York Convention, Pertamina requests discovery in this lawsuit under the Federal Rules of Civil Procedure. Specifically, Pertamina requests, as it did before the Tribunal, additional discovery related to KBC's ability to finance the Project. KBC opposes Pertamina's request, contending that it is improper under applicable law and the New York Convention, and is unwarranted factually. Pertamina's request for discovery is denied.

Rule 56(f) of the Federal Rules of Civil Procedure permits a district court, upon a proper showing by the party seeking Rule 56(f) relief, to delay consideration of a motion for summary judgment pending additional discovery. FED. R. CIV. P. 56(f); *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435,

1441 (5th Cir. 1993). "In order to obtain a continuance of a motion for summary judgment for discovery purposes, a party must set forth some statement to the court indicating why additional discovery is necessary and 'how additional discovery will create a genuine issue of material fact.'" *Canady v. Bossier Parish School Bd.*, 240 F.3d 437, 445 (5th Cir. 2001) (citing *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 28 F.3d 1388, 1395 (5th Cir. 1994)). A party "may not simply rely on vague assertions that additional discovery will produce needed, but unspecified facts." *Krim*, 989 F.2d at 1442 (internal citations omitted). It must show (1) why additional discovery is needed and (2) how that discovery will create a genuine issue of material fact. *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 535 (5th Cir. 1999) (citing *Krim*, 989 F.2d at 1442). If the party has not diligently pursued discovery, however, it is not entitled to relief under Rule 56(f). *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 28 F.3d 1388, 1397 (5th Cir. 1994).

Pertamina argues that this Court's review of its New York Convention defenses involves legal issues subject to *de novo* review, but concedes that the Court must defer to the Tribunal's factual findings. Pertamina's Response, at 2. Pertamina also concedes that the grounds for review under the New York Convention typically relate to the existing record and do not otherwise depend on discovery. Pertamina's Response, at 50 (citing *Frere v. Orthofix, Inc.*, Nos. 99CIV4049 and 00CIV1968, 2000 WL 1789641, at *4-*8 (S.D.N.Y. Dec. 6, 2000)). Discovery is particularly inappropriate in enforcement proceedings under the New York Convention. *See Imperial Ethiopian Gov't*, 535 F.2d at 337 ("the loser in arbitration cannot freeze the confirmation proceedings in their tracks and indefinitely postpone judgment by merely requesting discovery.").

As noted above, the right to due process protected by the New York Convention does not encompass the procedural rights guaranteed by the Federal Rules of Civil Procedure. *See Imperial Ethiopian Government*, 535 F.2d at 337; *Empresa*, 106 F. Supp. 2d at 1026; *Trans Chem.*, 978 F. Supp. at 310 ("The right to due process does not include the complete set of procedural rights guaranteed by the Federal Rules of Civil Procedure. By agreeing to arbitration [the respondent] subjected itself to its advantages and disadvantages."). Pertamina had notice at least as early as November 24, 1999, upon KBC's submission of its Revised Claim, that KBC was seeking lost profits.[16] *See* PX 31, Revised Statement, at 37. Indeed, the issue of available financing was raised and thoroughly addressed by Pertamina, without the benefit of any discovery, in its Reply to KBC's Revised Statement, *see* PX 40, Respondents' Reply, at 6, and through witness statements. There is no reason to allow the discovery Pertamina requests at this enforcement stage of the proceedings.

Finally, the Court's conclusion that the requested discovery is unwarranted at this stage is supported by statements of Pertamina's counsel at the conclusion of the arbitration hearing. Counsel stated that "discovery is to prepare for the hearing, it is not to supplement the record after the hearing" and that Pertamina's discovery request "went to the purported financial ability, the purported financing that would have been made available and other things, and I think the record on that has been fully made. I am prepared to rest on that

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[16] In its Notice of Arbitration, KBC claimed it was seeking damages from PLN and Pertamina for breach of both the JOC and ESC. *See* PX 6, Notice of Arbitration, ¶ 17(A). It was apparent at that point that KBC's ESC claim likely would include lost profits, and thus raised the issue of financing, because the ESC contemplated that the Project would be completed and electricity sold to PLN.

record, and so I think the discovery requests should no longer be in the picture." Hearing Transcript, Vol. V, at 807-08.

Even if discovery were appropriate at this late stage in the parties' dispute, and even if the Tribunal made a factual or legal error, Pertamina has failed to meet its Rule 56(f) burden to demonstrate why the requested discovery is material. This Court may not disturb the Tribunal's ruling absent a due process violation, or other ground under the New York Convention. Pertamina has failed to show that the evidence that could be discovered likely would lead to a finding that the arbitration process was fundamentally unfair, constituted a due process violation for some other reason, or violated the New York Convention in some other way. Thus, Pertamina's discovery request under Rule 56(f) is denied.

In sum, Pertamina has failed to meet its burden to show that circumstances warrant opening the record for additional evidence in this enforcement proceeding. Thus, the Court rejects Pertamina's request for discovery and its argument that KBC's motion for summary judgment is premature.

2. "Reversal" of the Preliminary Award

Pertamina contends that it was denied due process when the Tribunal found it liable for abiding by the requirements of the Presidential Decree despite having determined in the Preliminary Award that a "Government Related Event" is "not deemed to be a breach of contract by Pertamina or PLN but a Force Majeure event excusing KBC's non-performance." PX 28, Preliminary Award, at 19. Further, Pertamina contends that because the Tribunal explicitly stated that the matters to be considered at the hearing on the merits were to be "issues not resolved in this Preliminary Award," it did not have notice that it would be held liable for breach of contract. Pertamina's position misinterprets both the Preliminary Award and the Final Award, and defies logic. The Preliminary Award found that the Government of Indonesia was not

a party to the contracts and that Pertamina was not the alter-ego of the Government. However, it expressly recognized that Pertamina *would* bear the risk of loss arising from a Government Related Event:

> [T]he parties took care of the close relation of PERTAMINA and PLN with the [Government]. They included in both contracts a definition of "Government [R]elated Event" and, in both contracts, the Force Majeure clause indicates that a "Government [R]elated Event" is an event of Force Majeure with respect to KBC only. This has two consequences for the interpretation of the parties' intention. On the one hand, they were acknowledging that PERTAMINA and PLN had such a close relation with the GOI that a decision of the latter was not a Force Majeure event for them; on the other hand, they were confirming that the [Government] was not a party to the contracts since a governmental decision which prevents KBC to perform its obligations is not deemed to be a breach of contract by PERTAMINA or PLN but a Force Majeure event excusing KBC's non performance.

Id.

In the Final Award, the Tribunal found that Pertamina had a contractual responsibility to make KBC whole for a "Government [R]elated Event," not that the Presidential Decree constituted a breach of contract by Pertamina. The Tribunal stated:

> [The Preliminary Award] was not meant to express any view as to the consequences for PERTAMINA or PLN of a Governmental decision which prevents the performance of the Contracts. Contrary to Respondents' point of view, the fact that they are not responsible for the Governmental decision to prevent the performance of the Contracts does not exempt them from liability if they do not perform their own obligations in abiding by the decision. The Governmental decisions, in this case the

> Presidential Decrees n.39/1997 and n.5/1998, do not amount to a breach of Pertamina's and PLN's obligations. However, since a Governmental event is not a Force Majeure event for them, their non-performance has no legitimate excuse and must be considered as a breach of contract.
>
> Such distinction is far from being artificial, as the Respondents contend. It applies each time a party is actually prevented from performing its contractual obligations by an event which it cannot invoke as Force Majeure due to the existence of provisions to that effect in the contract or by application of the law.

PX 71, Final Award, ¶¶ 56-57.

Moreover, the Preliminary Award must be read in context with the Notice of Arbitration and all subsequent pleadings by claimant KBC and Respondents. KBC clearly and directly sought relief for alleged breaches of contract. In these circumstances, if Pertamina truly thought the Preliminary Award eliminated its liability for non-performance, then there was nothing left to arbitrate. At the very least, Pertamina had ample notice that the Tribunal would be hearing all of the matters addressed in KBC's Revised Statement of Claim, submitted *after* the Preliminary Award and approximately seven months before the hearing on the merits. Pertamina responded to those claims in its briefing to the Tribunal and thus demonstrated its awareness at the time of the matters in issue. Pertamina's self-serving, erroneous interpretation of the Preliminary Award, does not support a finding that the arbitration was fundamentally unfair. Indeed, Pertamina has failed to demonstrate that the Tribunal's own interpretation of its order is in any way unfounded.

C. *Alleged Violations of Public Policy*

The Convention allows confirmation of an award to be refused if "the recognition or enforcement of the award would be contrary to the public policy of that country." 9 U.S.C.

§ 201, Art. V(2)(b). Pertamina asserts that the Final Award is contrary to United States public policy because it (1) violates the internationally recognized doctrine of "abuse of rights" by awarding lost profits to KBC; and (2) holds Pertamina liable for refusing to violate governing Indonesian law.

Application of the public policy exception will succeed in only the narrowest of circumstances; indeed, vacating an arbitral award under this defense requires a violation of the "most basic notions of morality and justice." *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 593 (7th Cir. 2001) (quoting *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512, 516 (2d Cir. 1975); *see also Europcar*, 156 F.3d at 315; *Industrial Risk Ins. v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1445 (11th Cir. 1998); *Parsons & Whittemore Overseas, Co., Inc. v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974). The award must violate an "explicit public policy that is well-defined and dominant . . . [and is] ascertained by reference to the laws and legal precedents and not from general consideration of supposed public interests." *Industrial Risk Ins.*, 141 F.3d at 1445 (quoting *Drummond Coal Co. v. United Mine Workers, Dist. 20*, 748 F.2d 1495, 1499 (11th Cir. 1984) (internal quotes deleted).

1. Does The Lost Profits Award Constitutes [sic] An "Abuse of Rights"?

The international "abuse of rights" doctrine put forth by Pertamina in its defense of enforcement of the Final Award is akin to America's "good faith" principle of law. Joseph M. Perillo, "*Abuse of Rights: A Pervasive Legal Concept*," 27 PAC. L.J. 37, (Fall 1995). Actions constitute an abuse within the scope of the doctrine if: "(1) the predominant motive for the action is to cause harm; or (2) the exercise of a right is totally unreasonable given the lack of any legitimate interest in the exercise of the right and its exercise harms another; or (3) the right is exercised for a purpose other than that for

which it exists." JOHN D. CALAMARI AND JOSEPH M. PERILLO, THE LAW OF CONTRACTS, § 11.39 (4th 1998).

In asserting the "abuse of rights" doctrine, Pertamina does not argue that lost profits are never a legitimate form of damages for breach of contract, but that an award of lost profits in this particular case, when KBC never finished construction on the Project and the Indonesian economy was in ruins, constitutes an abuse of rights in violation of United States public policy.

First, Pertamina falls far short of meeting its burden to show that the "abuse of rights" doctrine is well-defined and dominant in United States law. Pertamina has not cited a single case holding that "abuse of rights" is a recognized doctrine in the United States or applying that doctrine to avoid enforcement of a contractual right. However, even assuming for purposes of the instant motion that "abuse of rights" is an accepted legal doctrine in this country, the facts of this case, as found by the Tribunal, do not meet the elements of an "abuse of rights" as set forth by the authority relied upon by Pertamina. There is no evidence, and thus can be no finding, that KBC's primary motivation was to cause harm to Pertamina or the Indonesian People; that KBC lacks a legitimate interest in asserting its right to lost profits by virtue of its contracts with Pertamina; or that KBC was attempting to exercise its right to recover lost profits for any purpose other than being compensated for its losses caused by Pertamina's failure to perform its obligations under the contracts. The fact that KBC was awarded a substantial sum of money, and Pertamina may think that its resources are better spent elsewhere, does not satisfy the doctrine.

In arguing that the lost profits award constitutes an "abuse of rights," Pertamina cites two arbitration awards that resulted from the same Presidential Decree that precipitated the arbitration in the instant case. *See* Petitioner's Legal Authorities

("LA") 2, Final Award dated May 4, 1999, *Himpurna California Energy Ltd. v. PT. (Persero) Perusahaan Listruik Negara* ("*Himpurna*"); LA 3, Final Award dated June 11, 1998, *Patuha Power Ltd. v. PT. (Persero) Perusahaan Listruik Negara* ("*Patuha*"). The arbitral tribunal that decided both *Himpurna* and *Patuha* invoked the doctrine of "abuse of rights" to deny the claimants' awards of lost profits. These awards contain extensive discussion of the "abuse of rights" doctrine. *See* Pertamina's Response, at 60-64. A review of those awards reveals that the tribunal was influenced by PLN's status as "an arm of governmental policy acting in pursuit of the public welfare" that had not intentionally deprived the claimant of valuable contractual rights, and by the dire straits of the Indonesian economy.[17]

The *Himpurna* and *Patuha* Final Awards were introduced into evidence by KBC, over Pertamina's objection.[18] Pertamina contends that despite its objection to those awards, it argued for application of the "abuse of rights" doctrine detailed therein, but the Tribunal ignored the doctrine. *See* Pertamina's Response, at 60. Pertamina's arguments fail for several reasons. First, prior arbitral awards are not precedential authority for the Tribunal or this Court. *See Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 147 (4th Cir. 1993).

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[17] It is noted that Pertamina's argument to this Court, that the interests of the Indonesian public demand that Pertamina be immune from liability for lost profits, is at odds with the vigorously defended position in the arbitration that Pertamina and PLN are not the alter-egos of the Indonesian Government. In any event, it is possible that the results in *Himpurna* and *Patuhi* [sic] are attributable, at least in part, to positions taken by PLN in those cases that are materially different from PLN's positions here.

[18] Pertamina's reliance on *Himpurna* and *Patuha* is also somewhat disingenuous given its argument to the Tribunal that those decisions should not be treated as precedents. PX 71, Final Award, ¶ 31.

Second, it is clear that the doctrine of "abuse of rights" was before the Tribunal, and was not "ignored."[19] The Final Award indicates that the Tribunal in reaching its conclusion considered the state of the Indonesian economy and balanced the harm to Pertamina and PLN against KBC's legitimate interest in enforcing its contractual rights. The Tribunal noted that "the worsening of the economic and political situation in Indonesia at the time has to be taken into account as regards both the conditions at which financing could have been obtained and possible delays in arranging the same." PX 71, Final Award, ¶ 133. The Tribunal further noted, "[t]here is no doubt . . . that the Claimant is entitled to obtain the benefit of its bargain in addition to recovering the expenditures it has incurred. As stated in the *Himpurna* award, '[t]o limit the recovery of the victim of a breach to its actual expenditures is to transform it into a lender, which is commercially intolerable when the party was at full risk for the amount of investments made on the strength of the contract.'" *Id.*, ¶ 122. Thus, by awarding KBC its lost profits, the Tribunal necessarily rejected the "abuse of rights" doctrine in light of the facts and arguments presented.

This Court sees no reason to revisit the merits of the Tribunal's factual findings or its Final Award in this regard. The Court concludes that Pertamina has not met its burden to establish that the award to KBC of lost profits violates public policy.

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[19] In any event, it is likely that disregard of a principle of law is not a valid basis for avoiding confirmation under the Convention. *See M & C Corp.*, 87 F.3d at 851 n.2 ("Whatever may be meant by the manifest disregard doctrine applicable in domestic arbitration cases, it is clear that such a doctrine does not rise to the level of a violation of public policy that is necessary to deny confirmation of a foreign arbitral award."); *RAKTA*, 508 F.2d at 977 ("Both the legislative history of Art. V and the statute enacted to implement the United States' accession to the Convention, are strong authority for treating as exclusive the bases set forth in the convention for vacating an award.").

2. Does the Final Award Hold Pertamina Liable For "Obeying The Law"

Pertamina lastly contends that the Tribunal held it liable for refusing to violate governing Indonesian law. As discussed *supra* in Section IV.B.2, at 103a-105a, this contention mischaracterizes the Final Award. The Tribunal did not find Pertamina liable for refusing to break the law.[20] Rather, in the Final Award, consistent with the Preliminary Award, the Tribunal found that Pertamina had a contractual responsibility to make KBC whole for a "Government [R]elated Event." The Tribunal thus found Pertamina liable for damages based on the parties' express contractual allocation of the risk of loss. As the Tribunal pointed out, the risk of loss was rational based on Pertamina's close relationship with the Indonesian Government.

Pertamina accordingly has not satisfied its burden to show that the Final Award offends the "most basic notions of morality and justice." Enforcement of the Final Award is not contrary to United States public policy.

V. CONCLUSION AND ORDER

Pertamina did not waive its right to assert the defenses established by the New York Convention in this case, but has failed to meet its burden of proof on any of its asserted defenses under the New York Convention. The Court finds that the arbitration was not contrary to the contractual agreements of the parties; Pertamina was not denied due process in connection with the arbitration proceeding; and the Final Award does not violate United States public policy. In addition, the Court concludes that Pertamina's request to be

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[20] Nor did the Tribunal hold that the Presidential Decree constituted a breach of contract by Pertamina, as Pertamina has argued elsewhere.

allowed to conduct discovery in this enforcement proceeding is without merit. It is therefore

ORDERED that KBC's Motion for Summary Judgment Confirming Arbitral Award [Doc. # 14] is GRANTED.

The Court will issue a separate Final Judgment.

FINAL JUDGMENT

In accordance with the Memorandum and Order issued this date, it is hereby

ORDERED that Petitioner Karaha Bodas Company, L.L.C.'s ("KBC's") Motion for Summary Judgment is GRANTED. It is further

ORDERED that the Final Award in the Arbitration dated December 18, 2000 is CONFIRMED. Therefore, in accordance with the Final Award, KBC shall recover from Pertamina:

(1) $111,100,000.00 for lost expenditures, plus interest at the rate of 4% per annum from January 1, 2001 until the date of full payment;

(2) $150,000,000 for lost profits, plus interest at the rate of 4% per annum from January 1, 2001 until the date of full payment;

(3) $66,654.92 for costs and expenses of the arbitration, plus interest at the rate of 4% per annum from January 1, 2001 until full payment.

Each party shall pay its own costs incurred in this proceeding.

/s/ Nancy F. Atlas
NANCY F. ATLAS
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 02-20042

KARAHA BODAS COMPANY, L.L.C.,
Plaintiff-Appellee,

v.

PERUSAHAAN PERAMBANGAN MINYAK DAN GAS BUMI NEGARA, *et al.*,
Defendants,

PERUSAHAAN PERAMBANGAN MINYAK DAN GAS BUMI NEGARA,
Defendant-Appellant.

March 5, 2003.

Before KING, *Chief Judge*, DAVIS, *Circuit Judge*, and ROSENTHAL,* *District Judge*.

PER CURIAM.

Appellant, Perusahaan Perambangan [sic] Minyak Dan Gas Bumi Negara ("Pertamina") contracted with appellee, Karaha Bodas Company, L.L.C. ("KBC") to develop geothermal energy sources in Indonesia for electrical power generation. The parties executed two contracts. Both contained an arbitration clause. In 1998, financial crises in Indonesia led to the suspension of the project. KBC initiated arbitration proceedings, which were conducted in Switzerland. The Tribunal entered an award in favor of KBC for damages

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* District Judge of the Southern District of Texas, sitting by designation.

resulting from the cancellation of the project. KBC then filed suit in the federal district court in the Southern District of Texas to confirm that award. This appeal is from the district court's grant of summary judgment confirming the award and rejecting Pertamina's challenges to the arbitration procedures and result.

Months after briefing on this appeal concluded, Pertamina filed in the district court a motion to set aside judgment under Rule 60(b)(2), based on newly discovered evidence that Pertamina contended should have been disclosed during the arbitration, and under Rule 60(b)(5), based on the decision of an Indonesian court annulling the arbitration award. A few weeks later, Pertamina filed in this court a motion to supplement the record and for supplemental briefing, seeking to have this court include in the appellate record both the recently discovered evidence and the information as to the post-judgment decision of the Indonesian court annulling the award. The developments in the Indonesian court are the subject of a separate appeal now pending before a different panel of this court; Pertamina urges this court to supplement the record on this appeal with the record of the separate pending appeal.

Pertamina urges this court to supplement the record and consider the additional evidence without the benefit of the district court's ruling on the Rule 60 motion pending in that court. KBC urges this court simply to deny the motion to supplement the record and for supplemental briefing. The threshold questions presented in this case are how this court should address the request to supplement the record to add materials that the district court did not consider, and how the district court should treat the Rule 60(b) motion to vacate its judgment when the appeal from the judgment is pending. Because the motion to supplement raises the same questions that are before the district court in the Rule 60(b) motion, the district court should consider those questions first. The Rule

60(b) motion is still pending in the district court, and that court has not yet indicated whether it intends to grant or deny the motion. Accordingly, the appeal from the grant of summary judgment will be held in abeyance to permit a limited remand for the district court to consider the merits of the Rule 60(b) motion.

I. *Background*

Petitioner-appellee KBC explores and develops geothermal energy sources and builds electric generating stations using geothermal sources. Respondent-appellant Pertamina is an oil, gas, and geothermal energy company owned by the Government of Indonesia.** KBC signed two contracts to produce electricity from geothermal sources in Indonesia in November 1994. The Joint Operation Contact granted KBC the right to develop geothermal energy sources in the Karaha area of Indonesia; Pertamina was to manage the project and receive the electricity generated. (Final Award, ¶ 4). Under the Energy Sales Contract, PLN agreed to purchase from Pertamina the energy generated by KBC's facilities. (*Id.* at ¶ 5). Both contracts contained arbitration clauses, calling for the application of the Arbitral Rules of the United Nations Commission on International Trade Law ("UNCITRAL") and specifying Geneva, Switzerland as the place of any arbitration. On September 20, 1997, the Indonesian government suspended the project because of the government's financial crisis. The project was indefinitely suspended on January 10, 1998. On February 10, 1998, KBC notified Pertamina and PLN that the government's suspension constituted an event of force majeure under the contracts.

KBC initiated arbitration proceedings on April 30, 1998. Pertamina disputes the procedures used in the appointment of the arbitrators and the consolidation of the arbitrations under

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** PLN, an electric utility owned by the Government of Indonesia, was a party to the arbitration but was dismissed from the district court action.

the two contracts. In its Preliminary Award, the Tribunal held that the Tribunal was properly constituted, that consolidation was proper, and that the Government of Indonesia was not a proper party. KBC filed its Revised Statement of Claim on November 24, 1999. Pertamina received a number of extensions before it filed its reply brief on April 7, 2000, and KBC filed its rebuttal on May 8, 2000. In response to the rebuttal, Pertamina sought additional discovery and a continuance of the proceedings, scheduled to begin on June 19, 2000, claiming that KBC had raised new assertions and new elements of its case-in-chief not contained in the Revised Statement of Claims. The parties had vigorously disputed whether KBC could have obtained financing to build the project if the government had not issued the suspension decree. Pertamina asserted that KBC's rebuttal introduced a new theory as to how it would have obtained financing, claiming that one of KBC's direct investors, FPL Energy ("FPL"), would have provided project financing if no other source was available. Pertamina sought discovery of FPL documents relating to the claim that FPL was prepared to finance the KBC project. The Tribunal denied Pertamina's requests for this discovery and for a continuance. The hearing on the merits was held in June 2000. The Tribunal stated in the final award that all parties had "waived their respective requests for discovery" at the conclusion of the hearing. (Final Award, ¶ 32). Pertamina disputes any waiver.

In the Final Award, issued in December 2000, the Tribunal found that Pertamina was liable for nonperformance of the contracts. The Tribunal interpreted the contractual provisions as "putting the consequences of a Governmental decision which prevents the performance of the contract at Pertamina's . . . sole risk." (Final Award, ¶ 57). The Tribunal awarded KBC $111.1 million to recoup its expenditures and $150 million in lost profits.

KBC brought an action in the district court to enforce the arbitral award. Under the Convention on the Recognition and Enforcement of Foreign Tribunal Awards (the "New York Convention"), 9 U.S.C. § 201, *et seq.*, a district court must confirm an arbitration award unless it finds one of seven grounds specified by the New York Convention for refusal or deferral of the award. 9 U.S.C. § 207; *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us*, 126 F.3d 15, 23 (2d Cir.1997). Pertamina challenged the award on three grounds under the New York Convention: the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties; Pertamina was "unable to present its case" to the Tribunal; and enforcement of the award would violate public policy of the United States, the country where enforcement of the award was sought. As to the first ground, Pertamina contended that the decision to consolidate the arbitrations under the two contracts was procedurally improper and that KBC's unilateral appointment of an arbitrator violated the rules specified in one of the contractual arbitration provisions. As to the second ground, Pertamina argued that the Tribunal improperly reversed its finding in the Preliminary Award that Pertamina did not breach the contracts when it held Pertamina liable for nonperformance in the Final Award; that the Tribunal's denial of Pertamina's request for discovery of FPL's records prevented Pertamina from fully presenting its case; and that the Tribunal's denial of a continuance after KBC's rebuttal prevented Pertamina from fully preparing its response. As to the third ground, Pertamina argued that the award violated the international "abuse of rights" doctrine and punished Pertamina for obeying the Indonesian government's decree. In the district court, Pertamina requested a delay in responding to the summary judgment motion under Federal Rule of Civil Procedure 56(f), seeking discovery of the same FPL records it had unsuccessfully sought in the arbitration.

The district court confirmed the award, rejecting each of Pertamina's grounds for refusal. In so doing, the district court carefully considered the record relating to Pertamina's ability in the arbitration proceeding to challenge KBC's claim that it could have obtained project financing from its investor, FPL. The district court denied Pertamina's Rule 56(f) request for additional discovery to obtain records. The notice of appeal from the district court judgment was filed on January 2, 2002.

In August 2002, an Indonesian court set aside the arbitral award. KBC contends that this order is void because the district court had issued an injunction ordering Pertamina to "take no action . . . to prosecute the action it filed against KBC in the District Court of Central Jakarta." Pertamina has another appeal, pending before another panel of this court, challenging that injunction. *Karaha Bodas Co. LLC v. Perusahaan, Etc.*, Case No. 02-20550.

KBC had also filed suit in Canada to confirm the arbitral award. In October 2002, after Pertamina perfected its appeal to this court, Pertamina discovered in the Canadian proceeding that FPL and one other KBC investor, Caithness, held political risk insurance covering the KBC project through Lloyd's of London. Pertamina also learned that Lloyds had paid $75 million under that insurance policy to FPL and Caithness.

In December 2002, Pertamina filed a motion in the district court to vacate the judgment under Rule 60(b), and, in this court, a motion to supplement the record and briefing. In both motions, Pertamina argues that the existence of the political risk insurance coverage in favor of FPL undermines KBC's claims, and the Tribunal's finding, that the contracts allocated political risks entirely to Pertamina. Pertamina also argues that the existence of the insurance coverage undermines KBC's arguments that FPL would have financed the project in order to avoid losing an earlier investment which was significantly less than the amount of the insurance proceeds

FPL received. Pertamina argues that the payment of the insurance proceeds undermines the Tribunal's determination of damages. Pertamina urges that KBC's failure to disclose the policy during the arbitration provides a basis for refusing to enforce the award, making the district court's summary judgment improper. As part of the motion to supplement in this court, Pertamina presents a report by an expert on arbitration proceedings and legal ethics, providing an opinion as to the legal significance of KBC's failure to disclose the political risk insurance policy during the arbitration proceedings. KBC has opposed both the motion to supplement the record in this court and the motion to vacate the judgment filed in the district court.

II. *Analysis*

A. *The Motion to Supplement*

Federal Rule of Appellate Procedure 10(e), providing for correction or modification of the appellate record, does not generally permit an appellate court to add to the record materials that were not before the district court. *See Morrison v. Hall*, 261 F.3d 896 n. 4 (9th Cir. 2001) ("Rule 10(e) cannot be used to add to or enlarge the record on appeal to include material which was not before the district court") (citations omitted); *In re Capital Cities/ABC*, 913 F.2d 89, 97 (3d Cir. 1990); *Ross v. Kemp*, 785 F.2d 1467, 1474 (11th Cir. 1986); *U.S. v. Hillsberg*, 812 F.2d 328, 336 (7th Cir. 1987) ("Rule 10(e) does not give this court authority to admit on appeal any document which was not made a part of the record in the district court); *Kemlon Prod. and Dev. Co. v. U.S.*, 646 F.2d 223, 224 (5th Cir. 1981) ("A court of appeals will not ordinarily enlarge the record on appeal to include material not before the district court"); *U.S. v. Page*, 661 F.2d 1080, 1082 (5th Cir. 1980) ("Rule 10(e) exists to allow the district court to conform the record to what happened, not what did not.") (citations omitted). The Fifth Circuit has ordinarily refused to supplement an appellate record with materials contained in

the record of related pending cases. *See U.S. v. Flores*, 887 F.2d 543, 546 (5th Cir. 1989); *Kemlon*, 646 F.2d at 224. Pertamina does not allege that the information it seeks to add to the record was omitted by error or accident. It considers the information "newly discovered evidence." Although appellate courts have an inherent equitable power to supplement the record on appeal to include information not presented to the district court, it is limited to circumstances not present here. *See Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 988 F.2d 61, 63 (8th Cir. 1993); *Ross v. Kemp*, 785 F.2d 1467, 1474-75 (11th Cir. 1986); *Gibson v. Blackburn*, 744 F.2d 403, n. 3 (5th Cir. 1984); *Dickerson v. Alabama*, 667 F.2d 1364, 1367 (11th Cir. 1982). Pertamina cannot add the newly discovered evidence to the record under appellate Rule 10(e). Pertamina's Rule 60(b) motion in the district court is based on this newly discovered evidence.

Pertamina's motion to supplement the appellate record is denied.***

B. *The Rule 60(b) Motion*

The Fifth Circuit, with other appellate courts, has addressed how to treat a Rule 60(b) motion for relief from a judgment filed while that judgment is on appeal. *Winchester v. U.S. Attorney for the Southern District of Texas*, 68 F.3d 947, 949 (5th Cir. 1995). The procedure adopted recognizes the "primacy of a district court's authority over motions for relief from its own judgments and the prohibition against two courts simultaneously exercising jurisdiction over a case."

*** This court can take judicial notice of another court's judicial action. *See Maher v. Hyde*, 272 F.3d 83, n.3 (1st Cir. 2001); *Najjar v. Ashcroft*, 257 F.3d 1262, 1283 (11th Cir. 2001); *U.S. v. Jones*, 29 F. 3d 1549, 1553-54 (11th Cir. 1994) (an appellate court may take judicial "notice of another court's ruling . . . for the limited purpose of recognizing the 'judicial act' that the order represents or the subject matter of the litigation and related filings.")

Fobian v. Storage Technology Corp., 164 F.3d 887, 889 (4th Cir. 1999). Under this procedure, a notice of appeal divests the district court of jurisdiction "except to take action in aid of the appeal until the case is remanded to it by the appellate court, or to correct clerical errors under Rule 60(a)." *Winchester*, 68 F.3d at 949 (quoting *Travelers Ins. Co. v. Liljeberg Enters.*, 38 F.3d 1404, 1407 n. 3 (5th Cir. 1994)). The district court has the power to consider and deny a Rule 60(b) motion filed after a notice of appeal, because the denial of the Rule 60(b) motion is in furtherance of the appeal. *Winchester*, 68 F.3d at 949. However, a district court may not grant a Rule 60(b) motion filed after a notice of appeal, without leave from the appellate court. "When the district court is inclined to grant the 60(b) motion, . . . then it is necessary to obtain the leave of the court of appeals. Without obtaining leave, the district court is without jurisdiction, and cannot grant the motion." *Id.; Ferrell v. Trailmobile, Inc.*, 223 F.2d 697, 698-699 (5th Cir. 1955).

Under the Fifth Circuit's procedure, the appellate court asks the district court to indicate, in writing, its inclination to grant or deny the Rule 60(b) motion. If the district court determines that the motion is meritless, the appeal from the denial is consolidated with the appeal from the underlying order. If the district court is inclined to grant the motion, it should issue a short memorandum so stating. Appellant may then move this court for a limited remand so that the district court can grant the Rule 60(b) relief. After the Rule 60(b) motion is granted and the record reopened, the parties may then appeal to this court from any subsequent final order. *See Fobian*, 164 F.3d at 890-91; *Winchester*, 68 F.3d at 949; *Tolliver v. County of Sullivan*, 957 F.2d 47, 49 (2d Cir. 1992); *Summers v. Utah*, 927 F.2d 1165, 1168-69 (10th Cir. 1991); *Com. of Puerto Rico v. SS Zoe Colcotrone*, 601 F.2d 39, 41-42 (1st Cir. 1979); *First Nat'l Bank of Salem, Ohio v. Hirsch*, 535 F.2d 343, 345-46 (6th Cir. 1976) (quoting *Smith v. Pollin*, 194 F .2d 349, 350 (D.C.Cir. 1952)).

This procedure balances efficiency considerations with the prohibition against dual exercise of jurisdiction by a district court and an appellate court. "It would be both inefficient and unfortunate to require the district court to wait until the underlying appeal is completed before giving any indication of its desire to grant a pending Rule 60(b) motion. Such a prohibition would likely render the initial appeal pointless in cases where the district court ultimately grants the motion following appeal." *Fobian*, 164 F.3d at 890. However, if the district court were to grant the Rule 60(b) motion and reopen the record while the appeal was still pending, this court and the appellate court would be impermissibly exercising jurisdiction over the same case. These conflicting concerns are resolved by having the district court deny, or indicate its intention to grant, the Rule 60(b) motion before this court proceeds with the appeal.

In this case, "the trial court is in a much better position to pass upon the issues presented in a motion pursuant to Rule 60(b)." *Standard Oil Co. of Ca. v. U.S.*, 429 U.S. 17, 19, 97 ~~S. Ct. 31,~~ 50 L. Ed. 2d 21 (1976). The district court's familiarity with the record makes it far better situated than this appellate court to determine quickly and easily whether the Rule 60(b) motion has merit. The district court is better situated than this court initially to determine the impact of Pertamina's newly-discovered evidence of the existence of political risk insurance coverage on the judgment confirming the arbitration award. That determination will require an examination of the relationship between that evidence and the existing record. Pertamina asserts that the evidence of the insurance calls into question the Tribunal's decisions on discovery in the arbitration process; the Tribunal's decision that the contracts allocated political risks entirely to Pertamina; KBC's contention in the arbitration that FPL was willing to provide financing to protect its earlier investment; and the Tribunal's calculation of damages suffered by KBC. Pertamina asserts that KBC perpetrated fraud on the Tribunal

by failing to disclose the insurance; KBC asserts that Pertamina failed to exercise due diligence that would have revealed the insurance coverage during the arbitration proceeding. The district court's familiarity with the record puts it in a better position initially to rule on these contentions.

If the district court decides that the Rule 60(b) motion should be denied, the district court can do so without disturbing appellate jurisdiction over the underlying judgment, permitting the appeal from the denial of the Rule 60(b) motion to be consolidated with the underlying appeal. If the district court decides to grant the Rule 60(b) motion, it must necessarily vacate the underlying judgment and reopen the record. The reopening of the record is precisely the result Pertamina seeks in this court by its motion to supplement, based on the same arguments the district court must consider in determining whether to grant or deny the motion to vacate.

This court remands for the limited purpose of asking the district court to consider the merits of the Rule 60(b) motion. This court does so without expressing any opinion on the merits of that motion and without ruling at this time on the appeal from the grant of summary judgment. The appeal is in abeyance pending the resolution of the Rule 60(b) motion. If the district court finds the Rule 60(b) motion meritless, the appeal from that denial can be consolidated with this appeal. If the district court determines that it is inclined to grant the Rule 60(b) motion, it should issue a short memorandum so stating. Pertamina can then move this court for a limited remand so that the district court can grant the Rule 60(b) relief, vacating the judgment and reopening the record. Once that has been accomplished, the parties can appeal to this court from any final order.

This court retains jurisdiction over the cause appealed except for the limited REMAND to permit the district court to state, in writing, whether it is inclined to deny or grant the Rule 60(b) motion.

APPENDIX D

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF TEXAS,
HOUSTON DIVISION

Civil Action No. H 01-0634

In the Matter of an Arbitration Between
KARAHA BODAS COMPANY, L.L.C.,
Petitioner,

v.

PERUSAHAAN PERTAMBANGAN MINYAK
DAN GAS BUMI NEGARA,
Respondent.

April 17, 2003

MEMORANDUM AND ORDER

ATLAS, *District Judge.*

This matter is before the Court on Perusahaan Pertambangan Minyak Dan Gas Bumi Negara's ("Pertamina's") Motion to Set Aside Judgment Under Fed. R. Civ. P. 60(b) ("Rule 60(b) Motion") [Doe. # 208].[1] Pertamina asks the Court to

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[1] See Pertamina's Memorandum in Support of its Motion to Set Aside Judgment Under Fed. R. Civ. P. 60(b) [Doc. # 209], and documentary exhibits and authorities [Doc. # 211] and expert reports [Doc. # 212] in support thereof; KBC's Memorandum in Opposition to Pertamina's Motion to Set Aside Judgment [Doc. # 220]; Pertamina's Reply Memorandum in Support of its Motion to Set Aside Judgment Under Fed. R. Civ. P. 60(b) [Doc. # 231], and expert reports [Doc. # 232] in sup-

vacate its December 4, 2001 Judgment ("Final Judgment") granting summary judgment to Karaha Bodas Company, L.L.C. ("KBC") and confirming the award of an international arbitration tribunal of more than $260 million to KBC ("Arbitral Award"). Pertamina filed its current motion pursuant to Federal Rule of Civil Procedure 60(b) almost a year after filing its Notice of Appeal from the Final Judgment. The Fifth Circuit has remanded the case to this Court for the limited purpose of determining the merits of the Rule 60(b) Motion. Having considered the parties' voluminous submissions, all matters of record, and applicable legal authorities, the Court **denies in part** Pertamina's Rule 60(b) Motion and retains the remaining issues presented by the Motion **under advisement**.

I. BRIEF FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of contracts between Pertamina and KBC for the construction and operation of an electrical power plant in Indonesia (the "Project"). The parties executed two contracts, the Joint Operation Contract ("JOC") and Energy Sales Contract ("ESC"), both of which contained an arbitration clause calling for arbitration of disputes under the Arbitral Rules of the United Nations Commission on International Trade ("UNCITRAL"). After the Project was suspended by the government of Indonesia, KBC initiated arbitration proceedings, which resulted in a December 2000 Arbitral Award in favor of KBC.

Pertamina filed an action in the Swiss Supreme Court seeking to annul the Arbitral Award. Shortly thereafter, KBC filed the instant action to confirm the Arbitral Award. The

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port thereof; KBC's Sur-Reply to Pertamina's Motion to Set Aside Judgment Under Fed. R. Civ. P. 60(b) [Doc. 3 239]; and Pertamina's Rebuttal Memorandum in support of its Motion to Set Aside Judgment Under Fed. R. Civ. P. 60(b) [Doc. # 240].

Swiss court dismissed Pertamina's appeal for untimely payment of fees. This Court issued the Final Judgment in favor of KBC a few months later. Pertamina filed, on January 2, 2002, a timely Notice of Appeal from that Final Judgment. While its appeal was pending, Pertamina filed a new suit in Jakarta, Indonesia seeking to annul the Arbitral Award. KBC sought and obtained a Preliminary Injunction from this Court ordering Pertamina to refrain from prosecuting the Indonesian action. Despite the Preliminary Injunction, Pertamina's actions resulted in an August 7, 2002 ruling from the Indonesian court setting aside the Arbitral Award and enjoining KBC from enforcing the Award. In December 2002, Pertamina filed this Rule 60(b) Motion asserting, among other things, that this Court should grant it relief from the Final Judgment because the Arbitral Award on which it is based has been annulled by an Indonesian court. The Fifth Circuit issued a limited remand to this Court for a ruling on Pertamina's 60(b) Motion. Pursuant to the parties' agreed briefing schedule, this matter was fully briefed and ripe for adjudication as of March 26, 2002.

II. ANALYSIS

Pertamina's 60(b) Motion has three parts: (1) a request for relief from this Court's December 4, 2001 Final Judgment under Rule 60(b)(2) based on newly discovered evidence, namely the existence of political risk insurance coverage for the investment in the Project pursuant to which KBC's investors were paid $75 million; (2) a request for relief from the December 4, 2001 Final Judgment under Rule 60(b)(5) because the Central Jakarta District Court annulled the underlying Arbitral Award on August 27, 2002; and, alternatively, (3) a request that the December 4, 2001 Final Judgment be deemed satisfied to the extent of the $75 million dollar insurance payment. This Memorandum and Order addresses only the second part of Pertamina's Rule 60(b) Motion relating to the effect of the Indonesian annulment.

Rule 60(b)(5) of the Federal Rules of Civil Procedure authorizes the Court to grant relief from its Judgment if the "judgment upon which it is based has been reversed or otherwise vacated." The Central Jakarta District Court annulled the Arbitral Award on August 27, 2002. Pertamina argues that the Jakarta annulment is valid under the Convention on the Recognition and Enforcement of Foreign Tribunal Awards ("New York Convention") because Indonesia is the court with primary jurisdiction over the Arbitral Award. Thus, Pertamina argues, this Court must vacate its Final Judgment enforcing the Arbitral Award pursuant Article V(1)(e) of the New York Convention.

The New York Convention contemplates two types of court proceedings following an arbitral award: (i) proceedings to annul or set aside the arbitral award; and (ii) proceedings seeking recognition and enforcement of the arbitral award. *See Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, F.3d 15, 23 (2d Cir.1997). Pursuant to Article V(1)(e) of the Convention, a court "may" refuse recognition and enforcement of an arbitration award if it has been set aside by a court of competent authority in "the country in which, or under the law of which" the award was made. The country in which, or under the law of which, the award was made is the court of "primary jurisdiction." Proceedings for recognition and enforcement of an arbitration award may be brought in the courts of any signatory country to the Convention. Such courts are said to have "secondary jurisdiction." Pertamina has submitted the Expert Report of Albert Jan van den Berg (March 29, 2002) (Ex. 7 to Pertamina's Opposition to KBC's Application for Turnover Order and Cross Motion for Stay of Enforcement and Ex. 0 to Pertamina's Rule 60(b) Motion), the Opinion of Professor W. Michael Reisman (May 6, 2002) (Ex. 1 to Brief in Support of Pertamina's Motion for Partial Stay and Ex. L to Pertamina's Rule 60(b) Motion), and W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNA-

TIONAL ADJUDICATION AND ARBITRATION 114 (1992) (Ex. 36 to Pertamina's Rule 60(b) Motion) is support of the New York Convention's jurisdictional scheme.

This Court is a court of secondary jurisdiction. That status constrained the Court on summary judgment to consider only the seven defenses to enforcement of the Arbitral Award specifically set forth in Article VI of the Convention, whereas a court of primary jurisdiction is not so limited. *See Yusuf, 126* F.3d at *21* (a motion to set aside an international arbitral award is controlled by the domestic law of the rendering state).

The general enforcement scheme of the New York Convention is not a matter of dispute. The issue presented by Pertamina's Rule 60(b) motion is whether, under that scheme, Indonesia has primary jurisdiction over the Arbitral Award. In its April 26, 2002 Preliminary Injunction, this Court concluded that the arbitration was conducted under the arbitral law of Switzerland, and thus Swiss courts have primary jurisdiction over the award. The Court stands by that decision, as explained hereafter. Because the Swiss Supreme Court rejected Pertamina's appeal, albeit on procedural grounds, Pertamina does not have a cognizable defense to the enforcement of the Arbitral Award under Article V(1)(e) of the New York Convention.

Pertamina now insists, contrary to its earlier actions and assertions, that the parties' contracts–the JOC and ESC–designate Indonesian arbitral law to govern the arbitration. Pertamina relies on the following contractual provisions for its position:

> The parties expressly agree to waive the applicability of (a) Article 650.2 of the Indonesian Code of Civil Procedure so that the appointment of the arbitrators shall not terminate as of the sixth (6th) Month after the date(s) of their appointments and (b) the second sentence of Article 620.1 of the Indonesian Code of Civil Procedure so that

> the arbitration need not be completed within the specific time.

JOC, Ex. 1, Article 13.2(a), ESC, Ex. 2, § 8.2(a).

> In accordance with Section 631 of the Indonesian Code of Civil Procedure, the Parties agree that the Tribunal need not be bound by strict rules of law where they consider the application thereof to particular matters to be inconsistent with the spirit of this Contract and the underlying intent of the Parties, and as to such matters their conclusion shall reflect their judgment of the correct interpretation of all relevant terms hereof and the correct and just enforcement of this Contract in accordance with such terms.

JOC, Ex. 1, Article 13.2(b); ESC, Ex. 2, § 8.2(b).

> The parties hereby renounce their right to appeal from the decision of the arbitral panel and agree that in accordance with Section 641 of the Indonesian Code of Civil Procedure neither Party shall appeal to any court . . . and accordingly the Parties hereby waive the applicability of Articles 15 and 108 of the Law No. 1 of 1950 and any other provision of Indonesian law and regulations that would otherwise give the right to appeal the decisions of the arbitral panel.

JOC, Ex. 1, Article 13.2(d); ESC, Ex. 2, § 8.2(d).

Pertamina's Indonesian law expert testifies that these provisions reference then applicable Indonesian law. "Declaration of Prof. Mr. Dr. Sudargo Gautama"[2] (March 25, 2002) (Ex. 5 to Pertamina's Turnover Opposition and Ex. F to Pertamina's Rule 60(b) Motion). This assertion is not disputed. Moreover, it is uncontested that Indonesian law is the substantive law governing the contracts.[3] Pertamina diverges

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[2] Gautama and his firm are counsel to Pertamina in the Indonesian action against KBC.

[3] To the extent Pertamina submits Gautama's Declaration as expert opinion that Indonesian law does not permit waiver of the right to seek an

from this Court's prior ruling by arguing that the above-quoted clauses indicate the intent of the parties to adopt Indonesian law as the procedural law governing the arbitration as well. Pertamina asserts that this Court has "eschewed" an analysis of the contracts and urges the Court to adopt Pertamina's positions. Contrary to Pertamina's contentions, the Court previously has scrutinized–and again now parses–the JOC and ESC terms. The Court finds Pertamina's position on the meaning of these contracts entirely unpersuasive.

It is the general rule that the procedural law of the place of arbitration governs an arbitration. As Pertamina's expert Albert Jan van den Berg has written, "the arbitration law of the country where the arbitration takes place governs the arbitration. The place of arbitration in this sense is determined by the parties in their arbitration agreement." Albert Jan van den Berg, *When is an Arbitral Award Nondomestic Under the New York Convention of 1958,* 6 PACE L. REV. 25, 44-45 (1985). Thus, by choosing to arbitrate in Geneva, Switzerland, and not including an express provision stating that Indonesian law governs the arbitration, the parties expressed their intent that the arbitration would be governed by Swiss law. *See also Karaha Bodas Co. v. Pertamina,* No. 28 OF 2002, In the High Court of the Hong Kong Special Administrative Region Court of First Instance (J. Burrell, Mar. 27, 2003) [Doc. # 242], at 14 ("I find it irresistible that the choice of Geneva as the `place' was also a

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annulment of an arbitration proceeding, the opinion is unsupported by authority and fails the requirements for admissibility of expert opinion established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, (1993). See *Tanner v. Westbrook*, 174 F.3d 542, 548 (5th Cir. 1999). Among other things, the testimony must be reliable and relevant. *Pipitone v. Biomatrix*, 288 F.3d 239, 243-45 (5th Cir. 2002); *Rodriquez v. Riddell Sports, Inc.*, 242 F.3d 567, 580-81 (5th Cir. 2001); *Tanner*, 174 F.3d at 546. Gautama provides no legal or other basis for his bold assertion.

choice that it was the formal 'seat' in the legal sense. By the same token it is plain that the choice of an independent neutral seat of arbitration carried with it an intention to be bound by the *lex arbitri* of that place.").

Pertamina also cites H.G. GHARAVI, THE INTERNATIONAL EFFECTIVENESS OF THE ANNULMENT OF AN ARBITRAL AWARD 20 (2002) (Ex. 40 to Pertamina's 60(b) Motion), for the proposition that a provision calling for arbitration in one country under the arbitration law of another country "often occurs in international transactions, particularly in State contracts to which one of the contracting parties is a State or related entity." However, other authorities submitted by Pertamina call such agreements "unusual," "exceptional," or a "dead letter." *See* Declaration of Prof. Mr. Dr. Sudargo Gautama, ¶ 14 (Ex. F to Pertamina's Rule 60(b) Motion); Expert Report of Albert Jan van den Berg, ¶¶ 9, 20 (Ex. 0 to Pertamina s Rule 60(b) Motion); *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3 d 15, 21 n. 3 (2d Cir.1997). In any event, the issue is purely academic because the contracts at issue here contain no provision calling for arbitration under the arbitration law of another country different from the country where the arbitration was held.

The Court agrees with Pertamina's contention that the parties have contractual autonomy to chose [sic] the applicable arbitral law. SEE ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARD A UNIFORM INTERPRETATION 267 (1981) (Ex. 41 to Pertamina's 60(b) Motion). "The first rule is the primary rule of party autonomy according to which the parties have the liberty to subject the arbitration agreement to the law of their choice. The second rule is the subsidiary rule of territoriality according to which the arbitration agreement is, *failing a choice of law by the parties,* governed by the law of the country where the award was made." *id.* at 291 (emphasis

added). Pertamina deduces from this innocuous general statement the unwarranted conclusion that the parties here chose Switzerland as the place of arbitration, but designated Indonesian procedural and substantive law to apply.

Article 13.2(d) of the JOC and § 8.2(d) of the ESC relate to post-award procedures, namely, a waiver of right to appeal an award to any court, not the conduct of the arbitration. The other two provisions cited by Pertamina refer to Indonesian arbitration law: one clause expressly *excludes* application of a provision of Indonesian law (JOC Article 13.2(a) and ESC § 8.2(a)), and one expressly *includes* application of a provision of Indonesian law (JOC, Article 13.2(b) and ESC, Ex. 2, § 8.2(b)). These provisions demonstrate that the parties intended to assume control over certain arbitration procedures as a matter of contract, whether or not those procedures would otherwise be applicable as a matter of law. The presence of those provisions in the contract is not evidence of the parties' choice of Indonesian arbitral law as a whole to govern the arbitration. Rather, these provisions demonstrate merely that the parties sought to avoid speculation or later argument about the effect of those provisions. Given the extensive detail of the parties' contracts, and the enormity of the Project-related finances, the parties–had they in fact desired–could have included a provision specifically incorporating Indonesian arbitral law despite the arbitration situs in Switzerland. Had they done so, they would have altered the standard territorial rule on applicable arbitral law. The parties did not do so. Pertamina's *post hoc* and forced construction of the contracts to serve its current purposes is not supported by the contractual language to which the parties are bound.

Pertamina insists, on the one hand, that the intent of the parties must be gleaned only "from the contractual language on which they agreed at the time of contracting." Pertamina's Reply, at 34. The Court agrees that this principle of contract

law applies. Nevertheless, Pertamina provides the Affidavit of G.A.S. Nayoan, the Exploration and Production Director of Pertamina, who was the principal negotiator of the contracts for Pertamina (Ex. 76 to Pertamina's Rule 60(b) Motion) as evidence of the parties' intent.[4] Under basic contract construction principles, endorsed by Pertamina as indicated, Nayoan's Affidavit constitutes parol evidence that is inadmissible to vary the unambiguous terms of the contracts. *See, e.g., Norfolk Shipbuilding & Drydock v. Seabulk*, 274 F.3d 249, 254 (5th Cir.2001); *Avatar Exploration, Inc. v. Chevron, U.S.A., Inc.*, 933 F.2d 314, 320 (5th Cir. 1991). Moreover, Nayoan's self-serving Affidavit is insufficient to create a genuine issue of material fact as to the meaning of the contracts in light of Pertamina's many written, post-dispute submissions and conduct evidencing a contrary intent.

Pertamina argues that its statements and actions in litigation are immaterial and that no judicial estoppel arises from them. The Court already has found that the parties' contracts, as written, demonstrate that the parties contracted for the application of Swiss arbitral law. The post-contract factual record concerning Pertamina's conduct corroborates the Court's findings made above regarding Pertamina's intent at the time of contracting with KBC. The Tribunal issued the Arbitral Award in favor of KBC in December 2000. On

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[4] Gautama's opinion that 'the parties intended to invoke the non-excluded provisions of Indonesian law as the governing law of their arbitral proceedings' (Ex. F to Pertamina's Rule 60(b) Motion, ¶ 13), as well as van den Berg's opinion that 'it was the parties' clear intention to choose Indonesian arbitration law' (Supplemental van den Berg Opinion, Ex. P to Pertamina's Rule 60(b) Motion), are inadmissible. They are not proper expert opinions; these opinions do not represent conclusions based on technical or specialized knowledge. They are, instead, parol evidence offered on factual matters. These opinions invade the Court's province to interpret the parties' contracts as a matter of law. Moreover, these witnesses have no personal knowledge of the contract negotiations, even if such matters were admissible.

February 1, 2001, Pertamina filed a proceeding to nullify the Award in the Swiss Supreme Court. This act of seeking nullification from the Swiss courts, not the Indonesian court, demonstrates as a factual matter that Pertamina intended Swiss arbitral law to apply and believed that the parties had agreed to Swiss arbitral law under their contracts. Pertamina reinforced its view in this regard through its repeated efforts to resuscitate the Swiss proceeding after the April 24, 2001 dismissal by the Swiss Supreme Court for failure to timely pay filing costs.

Meanwhile, on February 22, 2001, KBC filed this action seeking confirmation of the Arbitral Award. Pertamina participated fully in this case. After the Swiss court issued its final ruling in August 2001,[5] this Court issued, on December 4, 2001, its decision granting KBC's motion for summary judgment confirming the Arbitral Award and the Final Judgment in favor of KBC. Pertamina appealed the Final Judgment, but did not file a supersedeas bond to stay execution on the judgment. Belatedly, on March 14, 2002, approximately *fifteen months* entry of after [sic] issuance of the Arbitral Award, *eight months* after the Swiss court's dismissal of its appeal, and *over three months* entry [sic] of Final Judgment in this case, Pertamina filed an annulment action in Jakarta, Indonesia, challenging the Arbitral Award and seeking an injunction and penalties against KBC's enforcement of that Award.

Pertamina attempts to explain its failure to initially and timely seek relief from the Indonesian court. Pertamina states that under Indonesian law the action could not be filed until after the Arbitral Award was registered in Indonesia, which required several procedural steps and did not take place until March 8, 2002. However, Pertamina never asserts when it

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[5] On August 7, 2001, the Swiss Supreme Court declined to reconsider its decision and the dismissal became final.

began the steps to register the Award in Indonesia. Pertamina does not, in its many detailed and extensive submissions, provide any proof that it began this process promptly after the Award was issued in December 2000. Pertamina also fails to explain why it took such an extended period of time to register the Arbitral Award. Pertamina merely makes the unpersuasive, vague assertion that it commenced annulment proceedings in Indonesia "as early as was practicable" and that it "was able to cause the Award to be registered" as soon as it fulfilled the necessary procedural requirements.[6] This limited recitation stands in stark contrast to the fact that Pertamina promptly filed a proceeding challenging the Arbitral Award in Switzerland and argued strenuously for delays of proceedings before this Court pending the outcome of the Swiss proceeding. Pertamina never sought from this Court any delay pending an Indonesian action. This conduct is inconsistent with and belies Pertamina's current posture that KBC and Pertamina intended at the time of contracting that Indonesian courts have primary jurisdiction to annul the Arbitral Award.

Moreover, Pertamina's original interpretation of its contracts with KBC was in evidence when Pertamina repeatedly represented to the Tribunal that Swiss arbitral law applied to the arbitration. In its January 10, 1999 "Memorial Regarding Preliminary Issues" submitted to the Tribunal, Pertamina stated "Reference to Swiss Law supports this conclusion. As a result, arbitration proceedings under both contracts are governed by Chapter 12 of the Swiss Private International Law Statute."[7] The Tribunal relied on Pertamina's urging of

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[6] Pertamina's Memorandum in Support of Rule 60(b) Motion, at 10.

[7] Ex. 23 to KBC's Motion for Summary Judgment, at 27. *See also id.* at 28 ('Indeed, the Swiss Courts have required that parties strictly adhere to the precise terms of their arbitration agreement'); *id.* at 33 ('The arbitrators do not, under the arbitration agreements and the Swiss law in force at the seat of arbitration, have the power . . .'); *id.* at 38 ('It would

Swiss arbitral law in making the Award. *See, e.g.*, Preliminary Award in an Arbitration Procedure Under the UNCITRAL Arbitration Rules, September 30, 1999, § B(l) ("The Respondents support this conclusion by making reference to Swiss law as the JOC and the ESC provide for UNCITRAL Arbitration in Geneva between the parties which are neither Swiss nor Swiss resident. As a result, and under both contracts, the arbitration proceedings are governed by Chapter 12 of the Swiss Private International Law Statutes. Under Swiss law, [Respondent contends] the Arbitral Tribunal is lacking jurisdiction because KBC failed to comply with the contractual prerequisites to arbitration."); *id.* § C(l) ("The Respondents also state that, under the arbitration agreements and Swiss law, the arbitrators have no power to consolidate ..."); *id.* § C(3) (citing the "famous Westland Case" of the Swiss Federal Tribunal in support of its decision that a consolidated arbitration was appropriate); *id.* § D(l) (Respondents contend "such solution is not acceptable under the applicable Swiss law").

In asking this Court to stay this action pending its appeal to the Swiss Supreme Court, Pertamina reiterated its belief that the parties had agreed to Swiss arbitral law. Pertamina stated: "The arbitration award . . . was conducted subject to the arbitration laws of Switzerland, and the Swiss court is empowered to vacate an award rendered in Switzerland . . . KBC is asking this Court to act prematurely to confirm an award that might be overturned in the country whose law governed the arbitration."[8] These representations are strong circumstantial

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be subject to setting aside in Switzerland under Articles 179 and 190 of the Swiss PIL').

[8] Respondent Pertamina's Motion for Stay Pending Resolution of Swiss Appeal and Memorandum in Support [Doc. # 13], at *1*. *See also id.* at 6 ('it is fundamental that the courts of the originating nation are in the best position to pass on issues under their own law . . . Here, Pertamina's appeal encompasses questions of Swiss law'); Respondent Pertamina's

evidence that Pertamina intended, at least until March 2002, Swiss arbitral law to apply. These representations also are strong acknowledgments by Pertamina that in fact the governing arbitral law was that of Switzerland.[9]

Memorandum in Opposition to KBC's Motion for Summary Judgment [Doc. # 29], at 34-35 ('By adopting an arbitral procedure that resulted in such a disparate outcome, the tribunal thus exceeded its authority and failed to accord the parties equal treatment in direct contravention of the procedural law governing this arbitration. *See* RLA 1, Swiss Private International Law Statute ('PIL'), Article 182(3) ('the arbitral tribunal shall ensure equal treatment of the parties and the right of the parties to be heard in an adversarial procedure'); UNCITRAL Arbitration Rules, LA-6, Article 15 (requiring that parties 'are to be treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting its case.'). Neither the UNCITRAL Arbitration Rules nor the Swiss Private International Law Statute provide for non-consensual consolidation of arbitration disputes.'); Pertamina's Answer to Petition [Doc. # 8], at 9 ('the applicable laws and treaties governing international arbitration give courts of the arbitration situs, here Switzerland, authority to vacate such awards'); Joint Discovery/Case Management Plan [Doc. # 11], at 2 ('the arbitration KBC seeks to confirm was rendered in Geneva, Switzerland, and is subject to Swiss arbitration law (and Indonesian substantive law). Pertamina has filed with the Swiss Supreme Court an appeal of the arbitration award.').

[9] In addition, Pertamina's comments to the Court and the Tribunal support the imposition of judicial estoppel. Judicial estoppel is a matter of federal procedure governed by federal law. *Ergo Science, Inc. v. Martin*, 73 F.3d 595, 600 (5th Cir.1996). Application of judicial estoppel rests in the Court's discretion. *Ahrens v. Perot Sys. Corp.*, 205 F.3d 831, 833 (5th Cir.2000). Judicial estoppel is 'a common law doctrine by which a party who has assumed one position in his pleadings may be estopped from assuming an inconsistent position.' *In re Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir.1999) (quoting *Brandon v. Interfirst Corp.*, 858 F.2d 266, 268 (5th Cir.1988)); *Hall v. GE Plastic Pacific PTE, Ltd.*, 327 F.3d 391, 396 (5th Cir.2003); *Ahrens*, *205* F.3d at 833. Most courts have identified two limitations on the application of judicial estoppel: (1) the position of the party to be estopped must be clearly inconsistent with a prior position, and (2) the court must have accepted the prior position. *Coastal Plains*, 179 F.3d at 206; *Ahrens*, *205* F.3d at 833. Judicial

Pertamina further disputes KBC's contention that Swiss law forbids the application of another country's arbitral law to an arbitration conducted in Switzerland. *See* Opinion of George Friedli, Esq. (June 27, 2002) (Ex. 4 to Pertamina's Partial Stay Reply and Ex. E. to Pertamina's 60(b) Motion); Supplemental Opinion of Professor W. Michael Reisman (June 27, 2002) (Ex. 5 to Pertamina's Partial Stay Reply and Ex. M. to Pertamina's 60(b) Motion). The Court need not make a definitive ruling on this aspect of Swiss law because the Court rejects Pertamina's assertion that the parties' contracts designate the application of Indonesian arbitral law.[10]

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acceptance means only that the court has adopted the position urged by a party, *either as a preliminary matter* or part of a final disposition. *Coastal Plains*, 179 F.3d at 206 (emphasis added). This Court explained in its Preliminary Injunction that it relied on Pertamina's assertion that the Swiss court was the court with authority to annul the Arbitral Award in waiting until that court had ruled before considering KBC's summary judgment motion. Specifically, the Court set the briefing schedule in this case to allow time for the Swiss court to rule. The Tribunal also relied on Pertamina's prior position. *See supra* at 13-14. It is widely held that a position taken in an arbitration can give rise to judicial estoppel. *See Speroni S.P.A. v. Perceptron, Inc.*, No. 98-2192, 12 Fed.Appx. 355, 358 n. 1 (6th Cir. June 13, 2001), and cases cited therein; *cf. Universal American Barge Corp. v. J-Chem, Inc.*, 946 F.2d 1131, 1137 (5th Cir.1991) (an arbitration decision can have collateral estoppel or *res judicata* effect between the same parties in a subsequent proceeding). Thus, judicial estoppel does apply in this case to preclude Pertamina's current argument that Indonesia, not Swiss arbitral law applies. Pertamina's conduct reinforces this conclusion.

[10] Pertamina contends that a court in any state whose law is implicated by an award may make its own determination as to whether it has primary jurisdiction over an arbitral award. *See* ANDREAS BUCHER & PIERRE-YVES TSCHANZ, INTERNATIONAL ARBITRATION IN SWITZERLAND 29, 164 (1989) (Ex. 45 to Pertamina's 60(b) Motion). Pertamina's position appears contrary to the New York Convention's scheme for providing uniform rules for enforcement of international arbitration awards. Moreover, author Bucher notes that having 'a double test [for determination of primary jurisdiction], i.e., that of the place of

Pertamina next argues that the circumstances surrounding the negotiations of the parties' contracts evidences the parties' intent to incorporate Indonesian arbitral law. Specifically, Pertamina points to the agreements in the *Himpurna* and *Patuha* cases, in which the parties provided for arbitration in Indonesia. In those cases, the parties included the same provisions as in the JOC and ESC cited above regarding waiver or incorporation of Indonesian law. Pertamina contends that these similarities mean that the parties intended to adopt Indonesian arbitral law. Pertamina's argument falls of its own weight. What the *Himpurna* and *Patuha* cases show, if anything, is that the parties knew how to make the arbitration subject to Indonesian law if they wanted to do so. Significantly, the KBC-Pertamina JOC and ESC do not contain a key provision present in the *Himpurna* and *Patuha* contracts, namely, a requirement of arbitration in Indonesia. It is the choice of Switzerland as the site of arbitration that renders Indonesian arbitral law inapplicable, not the inclusion of the above quoted provisions in the JOC and ESC. In particular, the parties' choice of Switzerland as the arbitration site combined with the absence of an agreement by the parties to apply the law of a jurisdiction other than Switzerland to the arbitration makes Swiss arbitral law applicable. The choice of Indonesia as the site for the *Himpurna* and

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arbitration and that of the law governing the arbitration, can give rise to discrepancies,' for instance, 'an award purporting to be made in Switzerland under German arbitration law is considered a Swiss award in Switzerland and a German award in Germany, with the result that such an award could be challenged in both countries.' *Id.* The Court is unpersuaded by Pertamina's contention that Indonesia is in the 'precise position' as Germany in the foregoing example; the evidence simply does not support Pertamina's assertion that the arbitration here was made under Indonesian arbitration law. In any event, whatever effect a country's own determination of its primary jurisdiction might have within its own territorial boundaries, it does not follow that a second court, such as this one, is bound by another court's patently invalid exercise of primary jurisdiction.

Patuha arbitration negates Pertamina's attempted reliance on those cases.

Article V(1)(e) of the New York Convention provides that a court should deny enforcement of an arbitral award that has been annulled or set aside "by a competent authority of the country in which, or under the law of which" the award was made. This means that a court of secondary jurisdiction, such as this one, is discouraged from enforcing an award that has been set aside by a court of primary jurisdiction. This general proposition is not controversial. However, this premise does not answer the issue presented. First, at the time of this Court's Final Judgment, no court had annulled or set aside the Arbitral Award. This fact alone distinguishes this case from most of the cases cited by Pertamina.[11] However, even if, as Pertamina contends, a post-judgment annulment is grounds to vacate the enforcement decision, the defense applies only where an arbitral award has been annulled by a court of "competent jurisdiction." Because the Central Jakarta District Court is not a court of competent jurisdiction in light of the parties' contract, the other facts presented, and the New York Convention, the Indonesian court's ruling purporting to annul the Arbitral Award has no legal effect on this Court's December 4, 2001 Final Judgment confirming that Award.[12]

Pertamina additionally argues that because the Preliminary Injunction is not a final order, the Indonesian ruling should be given precedence. This argument misses the mark. Per-

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[11] *See Baker Marine (Nig) Ltd. v. Chevron (Nig) Ltd.*, 191 F.3d 194 (2d Cir.1999); *Spier v. Calzaturificio Tecnica, S.p.A.*, 71 F.Supp.2d 279 (S.D.N.Y.1999); *but cf. In re Chromalloy Aeroservices*, 939 F.Supp. 907 (D.D.C.1996) (enforcing an arbitration award despite its annulment by an Egyptian court).

[12] The High Court of the Hong Kong Special Administrative Region, Court of First Instance, reached the same conclusion in its March 27, 2003 decision in the enforcement action brought by KBC in that court. *See* Doc. # 242.

tamina conflates the issues raised by KBC's petition to enforce the Arbitral Award with the issues presented by the Preliminary Injunction, which relate to the propriety of Pertamina seeking a second forum for annulment of the Award. In using the term "Preliminary Injunction," the Court did not hold nor intend to suggest a lack of finality on the merits of the enforcement decision, as Pertamina argues. In fact, when KBC sought an order to restrain Pertamina's participation in the Indonesian action, and when the Court issued its Preliminary Injunction and the preceding Temporary Restraining Order, this Court's Final Judgment on the merits of KBC's claims already had been entered and was on appeal at Pertamina's instance. The Court, after due consideration, rejected Pertamina's primary jurisdiction arguments in its Memorandum in support of the Preliminary Injunction issued April 26, 2002.[13] The only thing "preliminary" about these injunctions was that this Court was willing, as an accommodation to Pertamina, if requested, to consider further briefing on the propriety of the injunction. Until the Rule 60(b) Motion, Pertamina did not request such further consideration. The Court now has considered all of Pertamina's primary jurisdiction arguments *de novo* in connection with the Rule 60(b) Motion. The Court rejects Pertamina's contentions, declines to vacate its Final Judgment awarding summary judgment to KBC, and will not alter its injunction.[14] As set forth in detail above, the Court again

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[13] Although the Court recognized that Pertamina contemplated using an Indonesian annulment order as the basis for a Rule 60(b) motion, the Court anticipated that the Preliminary Injunction would forestall any Indonesian annulment order until the Court decided the propriety of Pertamina's seeking that relief at the time it did.

[14] The Court does not base its decision on the *res judicata* effect of its Preliminary Injunction or on a finding that Pertamina's current Rule 60(b) Motion is itself a violation of the Preliminary Injunction. Therefore, it is not necessary to discuss the expert report of Geoffrey C. Hazard, Jr., Ex. T to Pertamina's Rule 60(b) Motion.

holds that the Swiss courts have primary jurisdiction over the Arbitral Award and thus the Indonesian ruling purporting to annul the Arbitral Award is not issued by a court of competent jurisdiction. The Indonesian annulment ruling therefore is invalid and of no force and effect.

In reaching this conclusion, the Court also has considered carefully principles of finality and comity. These principles do not militate in favor of the Indonesian annulment obtained through Pertamina's circumvention of the New York Convention and by forum shopping until a court ruled in its favor. Indeed, it is Pertamina that has failed to recognize the finality of this Court's prior judgment, which was entered after Pertamina's full participation in this action and after the Swiss Supreme Court rejected Pertamina's appeal under the arbitral law applicable to the parties' arbitration. Respect for foreign judicial systems is an important consideration in cases under the New York Convention. *See Monegasque De Reassurances S.A.M. (Monde Re) v. Nak Naftogaz,* 311 F.3d 488, 498-99 (2d Cir.2002). The interests of finality and comity are best served by enforcing this Court's Final Judgment confirming the Arbitral Award.

Pertamina's further argument that KBC has waived any objection to the jurisdiction of the Indonesian court by defending itself before that court and filing an appeal of the annulment ruling is without merit. The cases of *Hanes Supply Co., Inc. v. Valley Evaporation Co., 261* F.2d 29, 35 n. 7 (5th Cir.1958), and *Sprague & Rhodes Commodity Corp. v. Instituto Mexicano Del Cafe,* 566 F.2d 861, 863 (2d Cir.1977), cited by Pertamina, deal with a party's waiver of an objection to personal jurisdiction by appearing in an action, and have no application here.[15] Moreover, Pertamina

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[15] This is a unique case, substantively and procedurally. Pertamina's citation to the Restatement (Second) of Conflict of Law and Restatement (Third) of Foreign Relations regarding recognition of foreign judgments where the issue of personal jurisdiction has been fully litigated in the

is not entitled to the benefit of the equitable principle of waiver. The case in Indonesia was initiated by Pertamina after it had fully litigated its positions in the Courts of the United States. Pertamina exerted only superficial effort to comply with this Court's Temporary Restraining Order and Preliminary Injunction. The Court will not penalize KBC for defending itself against Pertamina's aggressive and questionable tactics.

This Court's Preliminary Injunction ruling and its ruling today are not intended to disparage the courts of Indonesia. The Court pointedly has directed its admonishments to the conduct of Pertamina, a party subject to its jurisdiction, not to criticize Indonesian courts.[16]

III. CONCLUSION AND ORDER

Because the Arbitral Award was made under the arbitral law of Switzerland, the Court rejects Pertamina's contention that the December 4, 2001 Final Judgment in this case must be vacated because of the August 7, 2002 annulment of the Arbitral Award by the Central District Court of Jakarta, Indonesia. It is therefore

ORDERED that Pertamina's Rule 60(b) Motion is **denied in part** to the extent it seeks relief under Rule 60(b)(5) based

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foreign jurisdiction also are inapposite. Indeed, § 482(2)(a) of the Restatement (Third) of Foreign Relations provides that 'a court in the United States need not recognize a judgment of the court of a foreign state if: (a) the court that rendered the judgment did not have jurisdiction of the subject matter of that action.' Likewise, Pertamina's reliance on cases recognizing the decision of another court's jurisdictional ruling based on full faith and credit is misplaced. The Indonesian court's, and this Court's, jurisdiction is governed by the specific provisions of the New York Convention.

[16] This Court does not and has not in any way credited or relied on KBC's assertions that the Indonesian courts are not an appropriate forum because they are biased or corrupt.

on the August 7, 2002 ruling of the Indonesian court. It is further

ORDERED that all other aspects of Pertamina's Rule 60(b) Motion are **retained under advisement** and will be the subject of a future Memorandum and Order from this Court.

Signed this 16th day of April, 2003.

/s/ Nancy F. Atlas
NANCY F. ATLAS
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Filed] JUN 02 2003

CIVIL ACTION NO. H-01-0634

IN THE MATTER OF AN
ARBITRATION BETWEEN

KARAHA BODAS COMPANY, L.L.C.,
Petitioner,

v.

PERUSAHAAN PERTAMBANGAN
MINYAK DAN GAS BUMI NEGARA,
Respondent.

MEMORANDUM AND ORDER

This matter is before the Court on Perusahaan Pertambangan Minyak Dan Gas Bumi Negara's ("Pertamina's") Motion to Set Aside Judgment Under Fed. R. Civ. P. 60(b) ("Rule 60(b) Motion") [Doc. # 208][1]. Pertamina asks the

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[1] *See* Pertamina's Memorandum in Support of its Motion to Set Aside Judgment Under Fed. R. Civ. P. 60(b) [Doc. #209], and documentary exhibits and authorities [Doc. #211] and expert reports [Doc. #212] in support thereof; KBC's Memorandum in Opposition to Pertamina's Motion to Set Aside Judgment [Doc. #220]; Pertamina's Reply Memorandum in Support of its Motion to Set Aside Judgment Under Fed. R. Civ. P. 60(b) [Doc.#231], and expert reports [Doc. #232] in support thereof; KBC's Sur-Reply to Pertamina's Motion to Set Aside Judgment Under Fed. R. Civ. P. 60(b) [Doc. #239]; and Pertamina's Rebuttal

Court to vacate its December 4, 2001 Judgment ("Final Judgment") granting summary judgment to Karaha Bodas Company, L.L.C. ("KBC") and confirming the award of an international arbitration tribunal ("Tribunal") of more than $260 million to KBC ("Arbitral Award"). Pertamina filed its current motion pursuant to Federal Rule of Civil Procedure 60(b) almost a year after filing its Notice of Appeal from the Final Judgment. The Fifth Circuit has remanded the case to this Court for the limited purpose of determining the merits of the Rule 60(b) Motion.

Pertamina's 60(b) Motion has three parts: (1) a request for relief from this Court's December 4, 2001 Final Judgment under Rule 60(b)(2) based on newly discovered evidence, namely, the existence of political risk insurance coverage for the investment in the Project pursuant to which certain KBC investors were paid $75 million; (2) a request for relief from the December 4, 2001 Final Judgment under Rule 60(b)(5) because the Central Jakarta District Court annulled the underlying Arbitral Award on August 27, 2002; and, alternatively, (3) a request that the December 4, 2001 Final Judgment be deemed satisfied to the extent of the $75 million dollar insurance payment. This Court partially denied Pertamina's Rule 60(b) Motion to the extent it sought relief based on the Indonesian annulment by its Memorandum and Order issued April 16, 2003 [Doc. # 247]. Having considered the parties' voluminous submissions, all matters of record, and applicable legal authorities, the Court now **denies** the remainder of Pertamina's Rule 60(b) Motion related to "new" evidence of a political risk insurance policy under which certain KBC investors were paid $75 million.

Memorandum in Support of its Motion to Set Aside Judgment Under Fed. R. Civ. P. 60(b) [Doc. #240].

I. BRIEF FACTUAL AND PROCEDURAL BACKGROUND

This Court has issued several written decisions in this case and will not repeat the factual background of this case on detail here.[1] Briefly, this matter arises out of contracts between Pertamina and KBC for the construction and operation of an electrical power plant in Indonesia (the "Project"). The parties executed two contracts, the Joint Operation Contract ("JOC") and Energy Sales Contract ("ESC"), both of which contained an arbitration clause calling for arbitration of disputes under the Arbitral Rules of the United Nations Commission on International Trade ("UNCITRAL"). After the Project was suspended by the government of Indonesia, KBC initiated arbitration proceedings. The parties participated in an arbitration in Geneva, Switzerland, which resulted in the December 2000 Arbitral Award of over $260 million in favor of KBC.

The issue currently before the Court involves a "political risk" insurance policy pursuant to which certain KBC investors were paid $75 million[2]. Pertamina contends that this insurance policy was responsive to its arbitration discovery request for any documents showing what consideration KBC and its investors, specifically FPL Energy ("FPL") and Caithness, gave to providing the $500 million financing necessary for the Project, and for all documents they

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[1] For more detailed background information, *see* Memorandum and Order issued November 30, 2001 granting summary judgment in favor of KBC [Doc. #45]; Memorandum and Order issued April 26, 2002 granting an injuction against Pertamina [Doc. #137]; Memorandum and Order issued April 16, 2003 denying in part Pertamina's Rule 60(b) Motion #247].

[2] The named insureds on the policy at issue are Karaha Bodas Investment Company, Caithness Indonesia Power Partners LP, Caithness Energy L.L.C., and Duvall Corporation. FPL is not a named insured. Ex. 58 to Pertamina's Reply, Policy No. 97BPL2126.

considered in making their financing decisions[3]. KBC refused to agree to Pertamina's requested discovery. The Tribunal deferred ruling on the discovery dispute until the conclusion of the merits hearing. At the merits hearing, Robert McGrath, Treasurer of the FPL Group, of which FPL is a subsidiary, testified regarding FPL's willingness to finance the project. When questioned by a member of the Tribunal as to as to whether the Project was protected by "OPIC political risk insurance,"[4] McGrath testified "I am not sure of that. I know there was some discussions at the time, but I don't recollect as to whether it was or wasn't." Arb. Tr. 453:17-21. A primary basis for Pertamina's motion is that this statement misled the Tribunal into concluding that there was in fact no political risk insurance of any kind for the Project.

At the conclusion of the arbitration hearing on the merits of KBC's claims, the Tribunal asked whether the parties desired a decision from the Tribunal on the stayed discovery requests. Arb. Tr. 807:2-17. In response, counsel for Pertamina and PLN stated that he was prepared to rest on the record as it stood, saying "[o]ur request went to the purported . . . financing that would have been made available and other things, and I think the record on that has been fully made. I am prepared to rest on that record, and so I think the discovery requests should no longer be in the picture." Arb. Tr. 807:2-808:13. Further, counsel for Pertamina commented "this has gone very nicely and the Tribunal has done a marvelous job." Arb. Tr. 814:11-13.

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[3] *See* Schedule to Pertamina's May 16, 2000 Submission to the Tribunal, Ex. 22 to Pertamina's Rule 60(b) Motion.

[4] "OPIC," the Overseas Private Investment Corporation, is a United States government-sponsored entity that provides political risk insurance. KBC's opposition, at 5; Ex D. to Pertamina's Rule 60(b) motion, Expert Report of Daniel R. Coquillette ("Coquillette Report"), ¶18 n.1 Pertamina was aware at the time of arbitration that other similar projects, known as Himpurna and Pataha Power, in which PLN, the Indonesian state-owned oil company, was involved were covered by OPIC insurance.

Pertamina contends that it first became aware of the possible existence of the insurance policy from an article in a Jakarta newspaper in July 2002, and confirmed its existence through limited discovery allowed by a Canadian court in a proceeding by KBC to enforce the Award. Pertamina therefore argues that it made this Motion as soon as possible upon discovery of the new evidence. KBC points out, in contravention of those representations, that KBC's Certificate of Interested Persons filed in this case March 8, 2001, disclosed several Lloyd's Syndicates as having a financial interest in the litigation and should have alerted Pertamina to the existence of the policy at issue[5].

II. LEGAL STANDARDS

Rule 60(b)(2) provides for relief from judgment on the basis of newly discovered evidence where the movant shows "that the evidence was discovered following the trial, that he used due diligence to discover the evidence at the time of the trial, that the evidence is not merely cumulative nor impeaching, that it is material, and that a new trial in which the evidence was introduced would probably produce a different result." *Government Fin. Servs. v. Peyton Place, Inc.*, 62 F.3d 767, 771 n.10 (5th Cir.1995) (quoting *Chilson v. Metropolitan Transit Auth.*, 796 F.2d 69, 72 (5th Cir. 1986)).

The judgment from which Pertamina seeks relief grants KBC summary judgment for enforcement of its Arbitral Award. KBC's motion was governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958 (the "New York Convention"), codified at 9 U.S.C. § 201 *et seq*. Thus, in order to be entitled to relief, Pertamina must show that the insurance policy would have created a genuine issue of material fact on one of the defenses to enforcement of the Arbitral Award recognized by the New York Convention. Pertamina argues that KBC's

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[5] *See* Certificate of Interested Persons dated March 8, 2001 [Doc.#4].

failure to produce the insurance policy in the arbitration shows that it was prevented from presenting its case within the meaning of Article V(1)(b) of the Convention, and that KBC's withholding of the policy violated its "duty of candor to the Tribunal" and is contrary to United States public policy, thus supporting a defense to enforcement under Article V(2)(b) of the Convention. Pertamina further argues that the existence of the policy underscores that it should have been granted discovery before entry of summary judgment in this case.

III. ANALYSIS

A. "Newly Discovered Evidence"

A few preliminary points are appropriate before addressing the major arguments briefed by the parties. Pertamina argues that the Fifth Circuit, by its *Per Curiam* Order remanding this case, intended to suggest that the insurance policy is newly-discovered evidence under Rule 60(b)[6]. The Court disagrees. To the contrary, had the Court of Appeals had such a view, it would have explicitly so ruled. The Court interprets the remand order to allow this Court to make its own determinations on all the issues presented in the Rule 60(b) Motion.

In any event, the Court assumes the existence of the insurance is "newly discovered" evidence and considers Pertamina's arguments on their merits. While there are serious questions about whether Pertamina lacked notice of the insurance once KBC commenced this case, this issue involves a fact-intensive inquiry that is unnecessary to resolution of the pending motion. Thus, the Court does not reach KBC's

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[6] The remand was for the limited purpose of "determin[ing] the impact of Pertamina's newly-discovered evidence of the existence of political risk insurance coverage on the judgment confirming the arbitration award." Order in Appeal No. 02-20042 dated March 5, 2003, at 13-14.

contention that Pertamina's Rule 60(b) Motion is not based on "newly discovered" evidence.

B. Article V(1)(b) - Due Process

The New York Convention provides for denial of confirmation of an arbitral award if the party against whom it is invoked can prove that it "was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case." 9 U.S.C. § 201, Art. V(1)(b). This enumerated defense "essentially sanctions the application of the forum state's standards of due process." *Iran Aircraft Indus. v. AVCO Corp.*, 980 F.2d 141, 145-46 (2d Cir. 1992). The fundamental requirement of due process is the opportunity to be heard at a "meaningful time and in meaningful manner." *Id.* at 146. Enforcement of the award may be denied only if there was a procedural infirmity that rendered the proceedings fundamentally unfair and caused prejudice to the complaining party. *Compagnie Des Bauxites De Guinee v. Hammermills, Inc.*, No. 90-0169, 1992 WL 122712, *5 (D.D.C. May 29, 1992). A fundamentally fair hearing is one that meets the minimum requirements of fairness: adequate notice, a hearing on the evidence, and an impartial decision by the arbitrators. *See Generica Ltd. v. Pharm. Basics*, 125 F.3d 1123, 1130 (7th Cir. 1997); *Sunshine Mining Co. v. United Steelworkers*, 823 F.2d 1289,1295 (9th Cir. 1987). The right to due process does not, however, encompass all the detailed procedural rights set forth in the Federal Rules of Civil Procedure. *Imperial Ethiopian Gov't v. Baruch-Foster Corp.*, 535 F.2d 334, 337 (5th Cir. 1976); *Empresa Constuctora Contex Limitada v. Iseki, Inc.*, 106 F. Supp. 2d 1020, 1026 (S.D. Cal. 2000); *see also In re Arbitration between Trans Chemical Ltd. and China Nat'l Mach. Import and Export Corp.*, 978 F. Supp. 266, 310 (S.D. Tex. 1997) (holding that "[t]he right to due process does not include the complete set of procedural rights guaranteed by the Federal Rules of Civil Procedure. By

agreeing to arbitration [the respondent] subjected itself to its advantages and disadvantages.").

Pertamina argues that the existence of political risk insurance refutes KBC's contention at arbitration that FPL was willing to finance the project to protect its $40 million investment, and casts serious doubt on KBC's contention, adopted by the Tribunal, that the parties' contract provided that Pertamina and PLN bore the entire risk of government action suspending the Project. Pertamina further argues that the amount of the insurance policy calls into question the amount of KBC's damages. Thus, Pertamina contends that the denial of discovery prevented it from discovering the insurance policy and in turn prevented it from presenting its case to the Tribunal.

These arguments lack merit. Pertamina's inability to offer evidence of the political risk insurance policy at the arbitration did not prevent it from receiving a fundamentally fair hearing. The context in which the financing issue arose is significant to the analysis of Pertamina's contentions. At the inception of the Project and continuing for several years, KBC intended to finance the Project through third-parties, such as banks. *See* Pertamina's Memorandum, at 5-6 and Exhibits 3-13. However, Pertamina argued in its opening arbitration brief that "no third party was willing to provide financing for projects in Indonesia in 1998 due to Indonesia's unstable political and economic situation." *Id.* at 6. As Pertamina itself frames the issue: "KBC's claim for $667.1 million in damages required that KBC could have performed the contract profitably absent the alleged breach. At the threshold, therefore, KBC had to prove that it could have obtained the $500 million necessary to construct the generating facilities on which its damage claim depended." *Id.* at 4 (emphasis added). Thus, the issue is whether KBC could have gone forward with the project if Pertamina and PLN met their obligations.

McGrath acknowledged the problem facing KBC in 1998 in obtaining third-party financing. *Id. at* 6; Ex. 17 to Pertamina's Rule 60(b) Motion, Declaration of Robert McGrath ("McGrath Declaration"), ¶ 21. However, McGrath and another KBC witness, Leslie Gelber, President and Chief Operating Officer of Caithness Energy L.L.C. and former Vice President of FPL, testified that FPL was willing in 1998 to provide the necessary financing because (1) FPL entities had already invested $40 million in the Project; (2) the ESC and JOC are dollar denominated; (3) the Project had the possibility for development of greater than 210 MW of energy; and (4) the ESC obligated PLN to obtain for KBC a letter of support of the type generally acceptable to lenders. McGrath Declaration, ¶¶ 15, 21-35; Ex. 18 to Pertamina's Rule 60(b) Motion, Declaration of Leslie Gelber ("Gelber Declaration"), ¶¶ 10, 26-35; Arb. Tr. 58:7. Thus, while in a general sense the availability of insurance may be a relevant factor that a prudent investor might consider in making a decision about project financing, the existence $75 million in insurance coverage on a $500 million project does not contradict or "refute" KBC's evidence that financing was available. This is particularly true where, as here, the proposed project financing was to come from an investor that was not the insured under the political risk insurance policy[7].

Pertamina's argument that the insurance policy refutes KBC's evidence regarding FPL financing is in actuality an attempt to challenge the credibility of KBC's witnesses[8]. Had the insurance policy been in evidence, the Tribunal presumably would have weighed it along with the testimony of McGrath and Gelber. The Tribunal found KBC's witnesses credible and ruled, "[r]egarding the financing necessary for the Project development, there is no reason in the Arbitral

[7] There is no evidence before the Court that the Caithness entities and FPL are not separate legal entities.

[8] *See* Coquillette Report,¶¶ 25-26.

Tribunal's opinion to cast doubts about [KBC's] readiness, directly and/or through its shareholders, to make provision thereof." Ex. 24 to Pertamina's Rule 60(b) Motion, Arbitral Award, ¶ 132. Credibility determinations, and weight of the evidence considerations, are beyond the purview of this court in reviewing the Arbitral Award, particularly upon a Rule 60(b) motion. *See Government Fin. Servs*, 62 F.3d at 771 n.10.

Pertamina's second argument, that the existence of the political risk insurance policy belies KBC's position that the contracts allocated such risk to Pertamina and PLN, also is unavailing. The allocation of risk is a contractual matter. The Court will not look to a third party contract like the insurance policy to determine the intent of the parties to the ESC and JOC. The Court agrees with the basic premise asserted by Pertamina's expert, Daniel R. Coquillette, that an individual or entity must have an insurable interest to secure an insurance policy[9]. However, KBC's investors clearly had an insurable interest in their investments. Some or all of the investors were entitled to attempt to partially protect their investments in the event the Project was terminated and PLN or Pertamina failed to live up to the contractual obligation to assume certain risks. It is not unusual for a party to have multiple layers of protection for a single interest; indeed, this practice is anticipated in the insurance policy's subrogation provision requiring repayment in the event an insured recovers from another source for an injury.

Similarly, the insurance policy, which had a coverage limit of $80 million, is not probative of the amount of KBC's damages. The insurance policy covered only some investors, not including FPL, in the event the Project did not go forward due to governmental action. There is no evidence that the policy was expected to cover the entire value of the Project,

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[9] *See* Coquillette Report, ¶¶ 23-25.

including potential lost profits. The Arbitral Award compensated KBC approximately $111 million for its expenses and $150 million for lost profits. Arbitral Award, ¶¶ 108, 136. The $75 million paid under the insurance policy is not so inconsistent with the Arbitral Award of approximately $111 million for expenses as to constitute evidence refuting KBC's proof of its damages. Moreover, insurance coverage costs money. A higher amount of protection requires a higher premium. Complex business decisions typically are involved in determining the appropriate amount of coverage. The extent of potential exposure to loss is only one element of that decision. The amount of insurance carried by a KBC investor simply is not probative of the actual damages incurred by KBC due to Pertamina's and PLN's breach of the parties' agreements.

The insurance policy, at best, is evidence that certain investors in the Project were protected to a limited extent in the event that the Project was terminated for political reasons. KBC, however, in order to succeed on its claims, was not required to prove at the arbitration that neither it nor any of its investors had political risk insurance. Pertamina has proffered no legally viable defense that would have been established by, or meaningfully supported by, proof that such insurance existed. The existence of the political risk insurance policy at issue suggests only that certain KBC investors had some doubts about the ability to collect damages ***if*** Pertamina or PLN failed to perform under the contracts as agreed. This is an entirely different matter from the issues of whether a different KBC investor would lend significant sums to fund the Project or whether the contracting parties had agreed that Pertamina would bear the risk of the Indonesian Government's intervention to stop the project. Thus, Pertamina's inability to rely on the insurance policy during the arbitration did not prevent Pertamina from presenting a meaningful case against KBC, and there was no denial of due process.

The circumstances here are materially distinquishable from those in *Iran Aircraft Indus. v. Avco*, 980 F.2d 141 (2d Cir. 1992), in which the Second Circuit refused to enforce an arbitral award pursuant to Article V(1)(b) of the New York Convention. In that case, the arbitration tribunal told the claimant, Avco, that it could present its evidence in summary form to support its damages claim. Yet, the Tribunal later denied Avco relief because Avco failed to present the underlying invoices to support its damage request. *Id.* at 146. The district court concluded, and the Second Circuit agreed, that the tribunal had prevented Avco from meaningfully presenting its damages case because the tribunal had changed the evidentiary requirements without notice to Avco.

Pertamina, in contrast, was not denied the opportunity to present a meaningful case to the Arbitral Tribunal. Pertamina was allowed to present and cross-examine witnesses. Pertamina submitted extensive briefing to the Tribunal. Pertamina knew McGrath and Gelber were testifying for KBC on the issue of financing, and it had an opportunity to conduct cross-examination to ask about the existence of political risk insurance if it was relevant. Nevertheless, Pertamina contends that procedural rules governing the arbitration prevented Pertamina from further questioning McGrath after the Tribunal posed its question regarding OPIC insurance during KBC's redirect of McGrath. However, Pertamina never asked for permission to do so. Further, Pertamina never pursued its earlier requests for discovery and did not ever specifically request insurance information, even after the subject was raised with McGrath by a Tribunal member. The Tribunal expressly gave the parties at the arbitration an opportunity to present or renew procedural objections. Pertamina stated that it had none. Pertamina did not argue to the Tribunal that McGrath's testimony illustrated the relevance and necessity of the discovery it had sought from KBC. The Tribunal itself, had it been interested or found it relevant, could have followed up on McGrath's

testimony and asked him or KBC for information about political risk insurance. None of these things occurred. Instead, Pertamina withdrew its discovery requests, and informed the Tribunal that it was satisfied that it had been given a fair hearing. Under the circumstances, Pertamina was not denied due process. *See In re Arbitration between Trans Chemical Ltd. and China Nat'l Mach. Import and Export Corp.*, 978 F. Supp. 266, 307 (S.D. Tex. 1997) (confirming arbitration award where respondent did not pursue discovery with tribunal and stated at the conclusion of the arbitration hearing that the arbitration had been conducted with "propriety and fairness").

In hindsight, Pertamina apparently wishes it had done things differently. As with its belated decision to pursue annulment proceedings in the Indonesian courts after initially futilely seeking review in the Swiss Supreme Court, Pertamina now attempts to undo the effect of an unsuccessful strategic decision made years ago during the arbitration itself[10].

Pertamina supplies no probative reasons to undermine the validity of a properly convened and conducted arbitration, or the integrity of the international arbitration system.

> Submission of disputes to arbitration always risks an accumulation of procedural and evidentiary shortcuts that would properly frustrate counsel in a formal trial. But because 'the advantages of arbitration are speed and informality, an arbitrator should be expected to act affirmatively to simplify and expedite the proceedings before him. Thus, whatever indignation a reviewing court may experience in examining the record, it must resist the temptation to condemn imperfect proceedings without a sound statutory basis for doing so.

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[10] Pertamina's arguments could be said to be a further attempt to avoid the impact of its arbitration agreement, as suggested by Pertamina's repeated and unexplained lengthy delays *inter alia* in appointing arbitrators and filing arbitration briefs.

Forsythe Int'l, S.A. v. Gibbs Oil Co. of Texas, 915 F.2d 1017, 1022 (5th Cir. 1990) (confirming award under Federal Arbitration Act). The fact that post-arbitration discovery revealed a marginally relevant document that Pertamina now believes it could have used (largely for impeachment purposes) at the arbitration does not establish a denial of due process attributable to the Tribunal's, or this Court's, refusal to grant requested discovery.

> In judging discovery requests in this context, the court must weigh the asserted need for hitherto undisclosed information and assess the impact of granting such discovery on the arbitral process. The inquiry is an entirely practical one, and is necessarily keyed to the specific issues raised by the party challenging the award and the degree to which those issues implicated factual questions that cannot be reliably resolved without some further disclosure.

Frere v. Orthofix, Inc., 2000 WL 1789641, * 5 (S.D.N.Y. Dec. 6, 2000); *see Lummus Global Amazon, S.A. v. Aguaytia Energy Del Peru*, S.R. LTDA, 2002 WL 31401996, *26-27 (S.D. Tex. March 27, 2002) (court denied discovery because the record was adequate to permit the court to decide the issues presented)[11].

The issue before this Court on summary judgment was whether Pertamina had a fundamentally fair hearing during the arbitration. The Court held, after close consideration of the extensive submissions and arguments by the parties, that the arbitration procedure and result did not violate Pertamina's due process rights. The record on summary

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[11] The *Lummus court* remanded the case to the International Chamber of Commerce on two narrow, specific, and limited issues. 2002 WL 31401996 at *36, *41. Neither party here has requested remand to the Arbitral Tribunal, and the circumstances necessitating remand in *Lummus*, *i.e.*, the failure of the arbitration panel's ruling to resolve all issues raised by the parties with certainty, is not present in this case.

judgment amply supports the Court's ruling, which was based *in part* on Pertamina's tactical decision to withdraw its discovery requests at the end of the arbitration hearing. The allegedly new evidence on which Pertamina relies to seek reconsideration does not alter the Court's conclusions. Pertamina's Rule 60(b) Motion based on Article V(1)(b) of the New York Convention is denied.

C. Article V(2)(b) - Public Policy

The Convention allows confirmation of an award to be refused if "the recognition or enforcement of the award would be contrary to the public policy of that country." 9 U.S.C. § 201, Art. V(2)(b). The public policy defense applies only in the narrowest of circumstances. Courts repeatedly have held that the public policy defense requires a violation of the "most basic notions of morality and justice." *Slaney v. Int'l Amateur Athletic Fed'n*, 244 F.3d 580, 593 (7th Cir. 2001) (quoting *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512, 516 (2d Cir. 1975); *see also Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 315 (2d Cir. 1998); *Industrial Risk Ins. v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1445 (11 th Cir. 1998); *Parsons & Whittemore Overseas, Co., Inc. v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974). The award must violate an "explicit public policy that is well-defined and dominant . . . [and is] ascertained by reference to the laws and legal precedents and not from general consideration of supposed public interests." *Industrial Risk Ins.*, 141 F.3d at 1445 (quoting *Drummond Coal Co., v. United Mine Workers, Dist.* 20, 748 F.2d 1495, 1499 (11th Cir. 1984) (internal quotes deleted)). The Court is not persuaded that KBC's failure to bring its investors' insurance policy to the Tribunal's attention renders the Arbitral Award void under the New York Convention.

The right to discovery in an arbitration is far more limited than in a traditional civil litigation under the Federal Rules of

Civil Procedure. *Frere v. Orthofix, Inc.*, 2000 WL 1789641, *4-5 (S.D.N.Y. 2000); *see Forsythe Int'l*, 915 F.2d at 1022 (noting in review of an arbitration under the Federal Arbitration Act that "such proceedings require 'expeditious and summary hearing, with only restricted inquiry into factual issues,'" quoting *Legion Ins. Co. v. Insurance General Agency*, 822 F.2d 541, 543 (5th Cir. 1987)). Thus, KBC's duty to voluntarily produce information or documents in the arbitration process is not to be judged by the extensive disclosure requirements for civil discovery under the Federal Rules. Furthermore, KBC did not "secretly" withhold a relevant document, as Pertamina contends. KBC consistently objected to Pertamina's discovery requests. Assuming for the sake of this analysis that the insurance policy was responsive to one of Pertamina's document requests, the Tribunal was aware of the parties' discovery dispute. The Tribunal never ordered KBC to produce responsive documents; instead, the Tribunal took the matter under advisement until after the hearing. Whether the Tribunal would have allowed further discovery before issuing its Final Award if Pertamina had not withdrawn its request cannot be known by this Court, nor Pertamina's expert[12]. Pertamina must live with its strategy decision. It is not contrary to United States public policy for KBC to decline to voluntarily turn over documents that it had no statutory, ethical, or other obligation to produce. The refusal to produce the insurance policy is not a justifiable basis for the Court to deny confirmation of the Arbitral Award.

More significantly, Pertamina has not supported the primary contention in its Motion that KBC misled the

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[12] *See* Coquillette Report, ¶ (opining that "had the Tribunal been aware of the policy it would likely have permitted Pertamina discovery on the issue."). This opinion is nothing more than speculation and is inadmissible. *See* FED R. Ev. 702; *Curtis v. M&S Petroleum, Inc.*, 174 F.3d 661, 668 (5th Cir. 1999) (expert testimony must be more than unsupported speculation or subjective belief).

Tribunal. There is no doubt that parties and their counsel owe a duty of candor to an arbitral tribunal.[13] However, Pertamina's argument that KBC deceived the Tribunal is premised on a mischaracterization of McGrath's testimony. McGrath was asked a direct question about the existence of OPIC insurance for the project. He answered that he recalled discussions regarding such insurance, but did not know one way or the other if any existed. There is no indication that McGrath was not truthful or was otherwise deceptive. In fact, it is just as likely that McGrath's answer led the Tribunal to believe that political risk insurance did exist as that it did not. Pertamina, had it thought necessary at the time, could have asked the Tribunal for permission to pose additional questions or requested that the Tribunal follow up. Pertamina did not do so. This was a sophisticated Tribunal, and so was Pertamina's counsel. If the interest of any of these people had been piqued by McGrath's answer, or if any had felt the existence of insurance was significant to the determination of whether KBC could have financed the project, a Tribunal member or Pertamina should have followed up at the arbitration. The failure of anyone to do so is a testament to the lack of genuine relevance of the issue[14]. There is no material issue of any deception. Rather, it appears that Pertamina may have re-evaluated its trial strategy.

Pertamina also argues that KBC breached its obligations under § 14 of the Energy Services Contract ("ESC," Ex. 2 to Pertamina's Rule 60(b) Motion). This argument lacks merit. Pertamina's contentions that the ESC required KBC to disclose the political risk insurance, and to obtain a waiver of subrogation, are contrary to the terms of that contract. The

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[13] *See* Coquillette Report, ¶¶ 38-42; Ex. S to Pertamina's Reply, Expert Report of Judge Stephen M. Schwebel, ¶¶ 4-9.

[14] Coquillette's putative expert testimony about what additional information the Tribunal would have been interested in based on this testimony is rank speculation, *see* Coquillette Report, ¶¶ 30-36, and is inadmissible.

ESC requires KBC to obtain insurance policies that "shall provide at least the types of insurance coverage and terms described in this Section 14." Section 14.2 lists the following types of insurance coverage KBC was obligated to obtain: (a) Construction/Erection All Risks (Clear) Insurance, which was to cover physical loss or damage to the permanent and temporary works of the facility under construction; (b) Marine Cargo Insurance, which was to cover physical loss or damage to materials, equipment, and supplies during transportation to the Project; (c) All Risks Property/ Machinery Insurance, which was to cover physical loss or damage to the "Generating Facilities" as defined in the contract; (d) Comprehensive General Liability Insurance, which was to cover legal liability for damage to property or bodily injury to third parties arising out of the construction, ownership, operation, and maintenance of the Generating Facilities; and (e) Worker's Compensation Insurance. The ESC required PLN and its employees to be additional insureds under the policies. ESC § 14.3. The ESC further required PLN and KBC each to cause its insurers to waive all rights of subrogation *against the other party* in respect to any claim arising under its insurance policies. *Id.*

The ESC does not address political risk insurance. Moreover, the ESC only specifies insurance to be secured by KBC, not its investors. Pertamina, citing no authority, argues that KBC cannot avoid its obligations under the ESC by having its investors secure insurance. This contention is unpersuasive. KBC's investors are not parties to the ESC. There is no evidence that the investors are alter egos of KBC. Moreover, the fact that the ESC required PLN, an Indonesian government entity, to be named as an "additional insured" under KBC's policies suggests that the ESC parties did not intend to include political risk insurance as part of that contract's requirements. The ESC provides no support for Pertamina's Rule 60(b) Motion.

D. Offset to Final Judgment

Finally, Pertamina contends that it is entitled to an offset of $75 million to the Final Judgment against it. Pertamina's argument is based on the fact that the ESC required KBC to secure a waiver of subrogation from its insurers. However, as discussed above, the ESC does not govern political risk insurance at all, let alone insurance purchased by a KBC investor. Pertamina's contentions must be rejected also because the insurance policy at issue contains a subrogation clause requiring the insured to repay the carrier for any benefits received if the insured recovers on a covered claim[15]. To the extent the insured (presumably one of the Caithness entities in this case) obtains any recovery based on the Final Judgment against Pertamina, the insured is obligated to repay the insurer. Thus, there will be no double recovery, and Pertamina is not entitled to any credit. The Court accordingly denies Pertamina's Rule 60(b) Motion requesting a $75 million offset to the Final Judgment.

IV. CONCLUSION AND ORDER

The Court has carefully considered each of Pertamina's arguments. Neither the existence of the political risk insurance policy under which Caithness, a KBC investor, was paid $75 million, nor the fact that the insurance policy was not disclosed to the Arbitral Tribunal, provides a ground to alter the Final Judgment granting summary judgment in favor of KBC to confirm the Arbitral Award pursuant to the New York Convention. It is therefore

ORDERED that Pertamina's Rule 60(b) Motion [Doc. # 208] is **DENIED**. SIGNED at Houston, Texas, this 30th day of May, 2003.

/s/ Nancy F. Atlas
NANCY F. ATLAS
UNITED STATES DISTRICT JUDGE

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[15] *See Ex.* 58 to Pertamina's Reply, Policy No. 97BPL2126, at 9(5).

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Filed Jun 12, 2003]

CIVIL ACTION NO. H 01-0634

IN THE MATTER OF AN ARBITRATION BETWEEN
KARAHA BODAS COMPANY, L.L.C.,
Petitioner,

v.

PERUSAHAAN PERTAMBANGAN MINYAK
DAN GAS BUMI NEGARA,
Respondent.

SUPPLEMENTAL ORDER

This Court denied Respondent Pertarnina's Motion to Set Aside Judgment Under Fed. R. Civ. P. 60(b) in a Memorandum and Order entered June 2, 2003 [Doc. # 248]. In a June 3, 2003 letter to the Court, KBC clarified that while it is true, as stated in the June 2, 2003 Order, that the entity known as FPL was not the insured under the political risk insurance policy at issue in Pertamina's Rule 60(b) Motion, Karaha Bodas Investment Company, a named insured that benefited under that policy, is owned by FPL. June 3, 2003 letter from Kenneth S. Marks [Doc. # 249]. On June 9, 2003, Pertamina filed a Notice of Appeal from the June 2, 2003 ruling. Pertamina has not responded to the June 3, 2003 letter.

There is no motion to reconsider the June 2, 2003 Order before the Court. However, the Court finds it appropriate to

acknowledge the issue raised by KBC. There is no dispute that it was KBC's position in the arbitration that project financing was to come from FPL. There is no dispute that FPL was not a named insured under the insurance policy. That fact was only one of many factors that the Court considered in denying Pertamina's Rule 60(b) Motion. Thus, the fact that an entity owned by FPL, but not FPL itself, benefited under the policy does not change any legal conclusion in the June 2, 2003 Order.

SIGNED at Houston, Texas, this 12th day of June, 2003.

/s/ Nancy F. Atlas
NANCY F. ATLAS
United States District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

[Filed Jul. 16, 2003]

CIVIL ACTION NO. H 01-0634

IN THE MATTER OF AN ARBITRATION BETWEEN
KARAHA BODAS COMPANY, L.L.C.,
Petitioner,

v.

PERUSAHAAN PERTAMBANGAN MINYAK
DAN GAS BUMI NEGARA,
Respondent.

ORDER CLARIFYING FACTUAL BASIS FOR JUNE 2, 2003 MEMORANDUM AND ORDER

This matter is before this Court on Karaha Bodas Company, L.L.C.'s ("KBC's") Motion and Memorandum to Amend Findings of Fact Under Fed. R. Civ. P. 52(b) ("KBC's Motion") [Doc. # 252]. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina") has filed a Response in opposition to KBC's Motion [Doc. # 255], and KBC has filed a Reply [Doc. # 256]. Pertamina has also filed a Supplemental Submission in Opposition to KBC's Motion to Amend Findings of Fact Under Fed. R. Civ. P. 52(b) [Doc. # 258]. Having considered the parties' submissions, all matters of record and applicable legal authorities, the Court concludes that KBC's Motion should be **granted** to the extent explained below.

In a Memorandum and Order entered June 2, 2003 [Doc. # 248] ("June 2nd Order"), this Court denied Pertamina's

Motion to Set Aside Judgment Under Fed. R. Civ. P. 60(b) ("Pertamina's Rule 60(b) Motion"). The Court previously had denied in part Pertamina's Rule 60(b) Motion in a Memorandum and Order entered April 17, 2003 [Doc. # 247]. By letter dated June 3, 2003 [Doc. # 249], KBC informed the Court that while FPL is not a named insured under the political risk insurance policy at issue (as noted in the June 2nd Order), FPL owns Karaha Bodas Investment Company ("KBIC"), which benefitted from the policy. Based on the representations in KBC's June 3, 2003 letter, to which Pertamina did not respond, the Court issued a Supplemental Order entered June 12, 2003 [Doc. # 251], stating that the fact that FPL was not a named insured under the insurance policy "was only one of many factors that the Court considered in denying Pertamina's Rule 60(b) Motion. Thus, the fact that an entity owned by FPL, but not FPL itself, benefitted under the policy does not change any legal conclusion in the June 2, 2003 Order." On the same day the Court issued its Supplemental Order, KBC filed its current motion.

Jurisdictional issues.–Pertamina argues that KBC's Motion is not a proper Rule 52(b) motion because that rule governs findings of fact rendered after a trial. Pertamina further argues that the Court cannot consider KBC's Motion under Rule 59(e) of the Federal Rules of Civil Procedure because KBC does not seek reconsideration of any of the Court's legal conclusions. The Court does not rely on Rule 52(b). However, the Court will consider KBC's Motion pursuant to Rule 59(e).[1] "[A]ny postjudgment motion to alter

[1] The Court notes that the Federal Rules of Civil Procedure do not provide for a "motion for reconsideration." *See Hamilton Plaintiffs v. Williams Plaintiffs*, 147 F.3d 367, 371 n.10 (5th Cir. 1998). Instead, a motion for reconsideration can be treated as a motion to alter or amend judgment under Rule 59(e) or a motion for relief from judgment under Rule 60(b). *Id.* A Rule 59(e) motion is a motion that calls into question the correctness of a judgment. *In re TransTexasGas Corp.*, 303 F.3d 571, 581 (5th Cir. 2002). Rule 59(e) is properly invoked "to

or amend the judgment served within ten days after the entry of the judgment, other than a motion to correct purely clerical errors covered by Rule 60(a), is within the unrestricted scope of Rule 59(e)." *Birdsong v. Wrotenbery*, 901 F.2d 1270, 1272 (5th Cir. 1990) (quoting the "bright-line" rule of *Harcon Barge Co. v. D & G Boat Rentals, Inc.*, 784 F.2d 665, 667 (5th Cir. 1986) (en banc). Thus, a Rule 59(e) motion may be used when a movant seeks alteration of findings or clarification of a district court's rulings underlying a final order. *See In re Stock Exchanges Options Trading Antitrust Litigation*, 317 F.3d 134, 143-44 (2d Cir. 2003) (Rule 59(e) motion filed seeking clarification of whether district court's dismissal was for lack of jurisdiction or on the merits of an affirmative defense); *Belair v. Lombardi*, 151 F.R.D. 698, 699 (M.D. Fla. 1993) (a motion to clarify the court's intentions regarding continuation of state court proceedings following dismissal in federal court is a motion to alter or amend the judgment under Rule 59(e) (citing *Birdsong*, 901 F.2d at 1272)).There is no reason that a Rule 59(e) motion cannot follow disposition of a Rule 60(b) motion, particularly in a case such as this in which Pertamina's Rule 60(b) motion sought district court consideration of new evidence not before the Court prior to entry of final judgment. This Court has jurisdiction under Rule 59(e) to consider KBC's Motion

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correct manifest errors of law or fact or to present newly discovered evidence." *Id.* (citing *Waltman v. Int'l Paper Co.*, 875 F.2d 468,473 (5th Cir.1989) (quoting *Keene Corp. v. Int'l Fid. Ins. Co.*, 561 F. Supp. 656, 665 (N.D. Ill. 1982) (internal quotations omitted))). In deciding a motion to alter or amend judgment pursuant to Rule 59, a court must strike the proper balance between two competing judicial imperatives: the need to bring litigation to an end, and the need to render just decisions on the basis of all the facts. *Edward H. Bohlin Co., Inc. v. Banning Co., Inc.*, 6 F.3d 350, 355 (5th Cir. 1993); *Lavespere v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167, 174 (5th Cir. 1990), *cert. denied*, 510 U.S. 859 (1993). A court has "considerable discretion" in granting a motion for reconsideration. *Bohlin*, 6 F.3d at 355; *Lavespere*, 910 F.2d at 174.

irrespective of Pertamina's notice of appeal. *Days v Johnson*, 322 F.3d 863, 865 n.4 (5th Cir. 2003) (noting "a timely filed Rule 59(e) motion suspends the appeal period, and a previously filed notice of appeal becomes effective upon the motion's disposition")[2].

***Clarification* of *Factual Basis for June* 2nd Order.**–The Court assumes, but does not decide, that FPL, which was not a named insured, can be said to have benefitted financially from the insurance policy at issue.[3] As is evident from a fair reading of the June 2nd Order, this assumption does not change any legal conclusion in that Order. The Court deemed the fact that FPL itself was not an insured under the insurance policy to be *additional* support for its various legal conclusions, not the sole basis for any holding in the June 2nd Order. The rationales for the Court's conclusions that Pertamina was not denied a fundamentally fair hearing before the Arbitral Tribunal, that confirmation of the Arbitral Award was not against public policy, and that Pertamina was not

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[2] Pertamina cites *Winchester v. U.S. Attorney for the S.D. Tex.*, 68 F.3d 947, 949 (5th Cir. 1995), for the proposition that its notice of appeal divests this Court of jurisdiction. The issue in *Winchester* was the district court's jurisdiction to grant a Rule 60(b) motion after notice of appeal without leave of the court of appeals. This case was remanded to this Court by the Court of Appeals for the express purpose of ruling on Pertamina's Rule 60(b) Motion. There is no reason why the Court here should not apply the general rule regarding the Court's jurisdiction to consider a timely filed Rule 59(e) motion despite Pertamina's notice of appeal.

[3] In its Supplenental Submission, Pertamina has presented a printout from the KBC website containing the statement "[i]t is a matter of public record that KBC's insurers, Lloyds of London, paid FPL Energy, L.L.C. and Caithness Energy, KBC's majority shareholders, a claim of US $75 million." Exhibit A to Pertamina's Supplemental Submission. Therefore, the Court **withdraws** (to the extent it has jurisdiction to do so) is comment in the June 12, 2003 Supplemental Order that FPL did not benefit from the insurance.

entitled to an offset in the amount of the insurance policy were not founded in any way on FPL's lack of benefit from the insurance policy. As the Court explained in the June 2nd Order:

- "[While in a general sense the availability of insurance may be a relevant factor that a prudent investor might consider in making a decision about project financing, the existence [of] $75 million in insurance coverage on a $500 million project does not contradict or 'refute' KBC's evidence that financing was available." June 2nd Order, at 10.
- Pertamina's arguments are "in actuality an attempt to challenge the credibility of KBC's witnesses." *Id.*
- "The allocation of risk is a contractual matter" not affected by existence of the insurance policy. *Id.* at 11.
- "Some or all of the investors were entitled to attempt to partially protect their investments in the event the Project was terminated and PLN or Pertamina failed to live up to the contractual obligation to assume certain risks. *Id.*
- The amount of political risk insurance is not probative of KBC's actual damages and "[t]he insurance policy, at best, is evidence that certain investors in the Project were protected to a limited extent in the event the Project was terminated for political reasons. KBC, however, in order to succeed on its claims, was not required to prove at the arbitration that neither it nor any of its investors had political risk insurance." *Id.* at 11-12.

- "Pertamina . . . was not denied the opportunity to present a meaningful case to the Arbitral Tribunal. Pertamina was allowed to present and cross-examine witnesses. Pertamina submitted extensive briefing to the Tribunal." *Id.* at 13.

- "Pertamina never pursued its earlier requests for discovery and did not ever specifically request insurance information, even after the subject was raised with McGrath by a Tribunal member." *Id.* at 14.

- "Whether the Tribunal would have allowed further discovery before issuing its Final Award if Pertamina had not withdrawn its request cannot be known by this Court, nor Pertamina's expert. Pertamina must live with its strategy decision. It is not contrary to United States public policy for KBC to decline to voluntarily turn over documents that it had no statutory, ethical, or other obligation to produce. *Id.* at 18 (footnote omitted).

- "Pertamina has not supported the primary contention in its Motion that KBC misled the Tribunal." *Id.* "Pertamina's argument that KBC deceived the Tribunal is premised on a mischaracterization of McGrath's testimony." *Id.* "[I]t is just as likely that McGrath's answer led the Tribunal to believe that political risk insurance did exist as that it did not. Pertamina, had it thought necessary at the time, could have asked the Tribunal for permission to pose additional questions or requested that the Tribunal follow up. Pertamina did not do so." *Id.* at 19.

- "Pertamina's contentions that the ESC [Energy Services Contract] required KBC to disclose the political risk insurance, and to obtain a waiver of

subrogation, are contrary to the terms of that contract." *Id.* at 19. "The ESC does not address political risk insurance. Moreover, the ESC only specifies insurance to be secured by KBC, not its investors." *Id.* at 20.

- Pertamina is not entitled to an offset because the ESC does not govern political risk insurance and the insureds are obligated to repay the insurance company if they receive any recovery on a covered claim. *Id.* at 21.

Thus no alteration of any legal conclusion in the June 2nd Order is necessary. The Court merely takes this opportunity to clarify that its conclusions were always, and continue to be, based on matters independent of FPL's benefit from the political risk insurance. It is therefore

ORDERED that KBC's Motion [Doc. #252] is **GRANTED** pursuant to rule 59(e) and this Order serves as clarification to the extent necessary.

SIGNED at Houston, Texas, this 15th day of July, 2003.

/s/ Nancy F. Atlas
NANCY F. ATLAS
United States District Judge

APPENDIX H

PRELIMINARY AWARD
IN AN ARBITRATION PROCEDURE
UNDER THE UNCITRAL ARBITRATION RULES

BETWEEN:

KARAHA BODAS COMPANY L.L.C., a company organised and existing under the laws of the Cayman Islands with its Registered office at Plaza Aminta Suite 901, Jl.T.B. Simatupang, Kav, 10, Jakarta 12310, Indonesia,

hereinafter referred to as « KBC »,
Claimant,

represented by Mr. Jonathan D. SCHILLER, BOIES & SCHILLER, 5301 Wisconsin Avenue, NW, Suite 570, Washington DC 20015, USA.

AND:

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA, a company organised and existing under the laws of Indonesia, with its Registered office at Jl. Kramat Raya n.59, 4th Floor, Jakarta 10450, Indonesia,

hereinafter referred to as « PERTAMINA »,
Respondent n°1,

PT. PLN (PERSERO), a company organised and existing under the laws of Indonesia, with Its Registered office at Jl. Trunojoyo n.135, Kebayoran Baru, Jakarta Selatan 12160, Indonesia,

hereinafter referred to as « PLN »,
Respondent n°2,

THE GOVERNMENT OF THE REPUBLIC OF INDONESIA, c/o Minister of Mines and Energy, with Its Registered office at Jalan Merdeka Selatan n°18, Jakarta Pusat, Indonesia,

hereinafter referred to as « GOI »,
Respondent n°3,

Respondent n°1, 2 and 3 being collectively referred to as the « Respondents » and represented by ADNAN BUYUNG NASUTION & PARTNERS, Wisma Danamon Aetna Life, 18th floor, Jl. Jend. Sudirman Kav. 45-46, Jakarta 12930, Indonesia and by Mr. John BISHOP, MASONS, 30 Aylesbury Street, London EC1R OER, United Kingdom.

I—RELEVANT FACTS

(A) *The parties*

KBC is a Cayman Islands limited life company which was granted contractual rights to develop the 400 MW Karaha Bodas Geothermal Project (hereinafter the « Karaha Project »), in West Java, Indonesia. KBC was to develop the project and sell electricity from generating units to PLN on behalf of PERTAMINA.

PERTAMINA is an oil and gas corporation, established by Law n.8 on 1971 and owned by the Government of the Republic of Indonesia. PERTAMINA is in charge for the exploration and exploitation of geothermal resources and generation of electricity in Indonesia.

PLN is a state-owned corporation subject to Government Regulation n.12/1998 and is the electric utility which undertakes the supply of electricity to the public in Indonesia.

The Government of the Republic of Indonesia, which KBC alleges to be a signatory to the agreements KBC entered into with PERTAMINA and PLN and guarantor of the performance by PERTAMINA and PLN of their obligations under the agreements.

(B) *The agreements*

On November 28, 1994, contracts were entered into as part of the Karaha project.

(1) *The Joint Operation Contract*

This contract (« the JOC »), establishes that PERTAMINA is responsible for the management of the geothermal operations of the Project and that KBC will serve as the Contractor.

As Contractor of the project, KBC was required to develop geothermal energy in the project area and to build, own and operate generating facilities.

The JOC indicates that it is made between PERTAMINA and KBC. It bears their respective representatives' signature and that of the Minister of Energy and Mines (sic) of Indonesia following the mention : « *Approved by the Minister of Mines and Energy this—day—of—19—on behalf of the GOVERNMENT OF THE REPUBLIC OF INDONESIA* ». It is common ground among the parties that the JOC was entered into on November 28, 1994.

Article 13 of the JOC includes the following clauses:

« *Consultation and Arbitration*

Article 13.1. If any dispute or difference of any kind whatsoever (a « Dispute ») shall arise among the parties in connection with, or arising out of, this Contract, or the breach, termination or validity thereof, the Parties shall attempt, for a period of thirty (30) working days after the receipt by one Party of a notice from the other Party of the existence of a Dispute, to settle such Dispute in the first instance by mutual discussions among the parties.

Article 13.2.

(a) If the Dispute cannot be settled within thirty (30) working days by mutual discussions as contemplated by Article 13.1 hereof, the Dispute shall finally be settled by an arbitral

tribunal (the « Tribunal ») under the UNCITRAL arbitration rules contained in Resolution 31/98 adopted by the United Nations General Assembly on December 15, 1976 and entitled « Arbitration Rules of the United Nations Commission on International Trade Law » as in force at the time such arbitration is commenced. Each party will appoint an arbitrator within thirty (30) days after the date of a request to initiate arbitration, who will then jointly appoint a third arbitrator within thirty (30) days of the date of the appointment of the second arbitrator, to act as Chairman of the Tribunal. Arbitrators not appointed within the time limits set forth in the preceding sentence shall be appointed by the Secretary General of the International Center for Settlement of Investment Disputes. Both parties undertake to implement the arbitration award. The site of the arbitration shall be in Geneva, Switzerland. The language of the arbitration shall be English. The parties expressly agree to waive the applicability of (a) article 650.2 of the Indonesian Code of Civil Procedure so that the appointment of arbitrators shall not terminate as of the sixth (6) months after the date(s) of their appointment and (b) the second sentence of Article 620.1 of the Indonesian Code of Civil Procedure so that the arbitration need not be completed within the specific time.

(b) The award rendered shall apportion the costs of the arbitration. In accordance with Section 631 of the Indonesian Code of Civil Procedure, the Parties agree that the Tribunal need not be bound by strict rules of law where they consider the application thereof to particular matters to be inconsistent with the spirit of this Contract and the underlying intent of the Parties, and as to such matters their conclusion shall reflect their judgement [sic] *of the correct interpretation of all relevant terms hereof and the correct and just enforcement of this Contract in accordance with such terms.*

(c) The award rendered shall be in writing and shall set forth in reasonable detail the facts of the Dispute and the reasons for the Tribunal's decision.

(d) The award rendered in any arbitration commenced hereunder shall be final and binding upon the parties and judgement [sic] *thereon may be entered in any court having jurisdiction for its enforcement. The Parties hereby renounce their right to appeal from the decision of the arbitral panel and agree that in accordance with Section 641 of the Indonesian Code of Civil Procedure neither party shall appeal to any court from the decision of the arbitral panel and accordingly the Parties hereby waive the applicability of articles 15 and 108 of Law n.1 of 1950 and any other provision of Indonesian law and regulations that would otherwise give the right to appeal the decisions of the arbitral panel. In addition, the Parties agree that neither Party shall have the right to commence or maintain any suit or legal proceeding concerning a dispute has been determined (sic) in accordance with the arbitration procedure provided for herein and then only to enforce or facilitate the execution of the award rendered in such arbitration.*

(e) During the pendency of any arbitration (i) CONTRACTOR shall continue to perform its obligations hereunder to produce and deliver electricity and PERTAMINA shall continue to pay all amounts due hereunder and not in dispute, without setoff, during the pendency of such arbitration, and (ii) neither PERTAMINA nor CONTRACTOR shall exercise any other remedies hereunder arising by virtue of the matters in dispute, provided in any event that the right to terminate the contract pursuant to Section 17 hereof, may be exercised notwithstanding pendency of any arbitration ».

(2) *The Energy Sales Contract*

By this contract (« the ESC »), PLN agreed to purchase from PERTAMINA the electricity produced by and delivered

from or made available by the generating facilities constructed by KBC.

As the Contractor to PERTAMINA pursuant to the JOC, KBC was entitled under the ESC to deliver and sell to PLN on behalf of PERTAMINA up to 400 MW of electricity from the Karaha Project.

The ESC indicates that it is made between PLN, PERTAMINA and KBC and bears their representatives' signature. It also bears the signature of the Minister of Mines and Energy of Indonesia, preceded by the mention: « *Approved by the Minister of Mines and Energy this—day—of—19—on behalf of the GOVERNMENT OF THE REPUBLIC OF INDONESIA* ». *It* is common ground among the parties that the ESC was entered into on November 28, 1994.

Section 8 of the Energy Sales Contract includes the following clause:

«*8.1 Consultation*

If any dispute or difference of any kind whatsoever (a « Dispute ») shall arise among the parties in connection with, or arising out of, this Contract, or the breach, termination or validity hereof, the Parties shall attempt, for a period of forty-five (45) calendar days after the receipt by one Party of a notice from another Party of the existence of a Dispute, to settle such Dispute in the first instance by mutual discussions among the Parties.

8.2 Arbitration

(a) If the Dispute cannot be settled within forty-five calendar (45) days by mutual discussions as contemplated by Section 8.1 hereof, the Dispute shall finally be settled by an arbitral tribunal (the « Tribunal ») under the UNCITRAL Arbitration Rules contained in Resolution 31/98 adopted by the United Nations General Assembly of December 15, 1976 and entitled « Arbitration rules of the United Nations Commission on

International Trade Law » as in force at the time such arbitration is commenced. PLN on one hand and COMPANY and PERTAMINA on the other hand will each appoint one arbitrator, in each case within thirty (30) days after the date of a request to initiate arbitration, who will then jointly appoint a third arbitrator, within thirty (30) days of the date of the appointment of the second arbitrator, to act as Chairman of Tribunal. Arbitrators not appointed within the time limits set forth in the preceding sentence shall be appointed by the Secretary General of the International Center for Settlement of Investment Disputes, upon the request of any Party. All Parties undertake to implement the arbitration award. The site of the arbitration shall be Geneva, Switzerland. The language of the arbitration shall be English. The Parties expressly agree to waive the applicability of (a) Article 650.2 of the Indonesian Code of Civil Procedure so that the appointment of arbitrators shall not terminate as of the sixth (6) months after the date(s) of their appointment and (b) of the second sentence of Article 620.1 of the Indonesian Code of Civil Procedure so that the arbitration need not be completed within the specific time.

(b) The award rendered shall apportion the costs of the arbitration. In accordance with Section 631 of the Indonesian Code of Civil Procedure, the parties agree that the Tribunal need not be bound by strict rules of law where they consider the application thereof to particular matters to be inconsistent with the spirit of this Contract and the underlying intent of the Parties, and as to such matters their conclusion shall reflect their judgment of the correct interpretation of all relevant terms hereof and the correct and just enforcement of this Contract in accordance with such terms.

(c) The award rendered shall be in writing and shall set forth in reasonable detail the facts of the Dispute and the reasons for the Tribunal's decision.

(d) The award rendered in any arbitration commenced hereunder shall be final and binding upon the Parties and judgement [sic] *thereon may be entered in any court having jurisdiction for its enforcement. The Parties hereby renounce their right to appeal from the decision of the arbitral panel and agree that in accordance with Section 641 of the Indonesian Code of Civil Procedure no Party shall appeal to any court from the decision of the arbitral panel and accordingly the parties hereby waive the applicability of articles 15 and 108 of Law n°1 of 1950 and any other provision of Indonesian law and regulations that would otherwise give the right to appeal the decisions of the arbitral panel. In addition, the parties agree that no Party shall have any right to commence or maintain any suit or legal proceeding concerning a dispute hereunder until the dispute has been determined in accordance with the arbitration procedure provided for herein and then only to enforce or facilitate the execution of the award rendered in such arbitration.*

(e) During the pendency of any arbitration (i) COMPANY shall continue to perform its obligations hereunder to produce and deliver electricity and PLN shall continue to pay all amounts due hereunder and not in dispute, without setoff during the pendency of such arbitration, and (ii) neither PLN nor COMPANY shall exercise any other remedies hereunder arising by virtue of the matters in dispute, provided in any event that the right to terminate the Contract pursuant to Section 11 hereof may be exercised notwithstanding pendency of any arbitration. »

(3) *The « letter of November 1994 »*

Copy of a document dated November 1994 was submitted by the Claimant (hereinafter the « *letter of agreement* », *the* « *letter of comfort* » or the « *letter of support* »), the text of which indicates that the GOI will cause PERTAMINA and

PLN to « discharge » payments and obligations under the JOC and the ESC.

Furthermore, the copy of the document submitted indicates:

« Any dispute or claim arising out or relating to this matter shall be settled by arbitration under UNCITRAL Arbitration Rules in effect at the time of the arbitration, in Geneva, Switzerland, and otherwise in accordance with the procedural provisions set forth in Section 8 of the ESC and Article 13 of the JOC ».

The same copy indicates that the document is signed for the GOI by the Minister of Mines and Energy.

The GOI denies any knowledge of this letter.

(C) *Suspension of the Project*

(i) *The September 20, 1997 Presidential Decree*

On September 20, 1997, a Presidēntial Decree was issued under n.39/1997. This Decree emphasised that « *in order to safeguard economic continuity and the general progress of the national economy, it is deemed necessary to take steps to deal with the monetary fluctuation and the consequences arising therefrom* ». It further stressed *that « in the frame-work of dealing with this problem, it is necessary to postpone/ review a number of Government projects, State-Owned enterprises projects and private projects related to the Government or the State-Owned Enterprises ».*

Its Article 5 was postponing a group of 75 government related infrastructure projects, including the Karaha Project.

(ii) *The November 1st, 1997 Presidential Decree*

On November 1st, 1997, a Presidential Decree n.47/1997 was issued which ordered that several of the postponed projects would be resumed, including the Karaha Project.

(iii) *The January 10, 1998 Presidential Decree*

On January 10, 1998, a Presidential Decree n.5/1998 was issued which revoked Decree n.47/1997 and confirmed the postponment [sic] of the Karaha Project.

II—THE PROCEDURE

On April 30th, 1998, Claimant served a Notice for Arbitration on the Respondents, nominating Prof. Piero BERNARDINI as arbitrator

As none of the Respondents had nominated an arbitrator so far, by letter to the Secretary General of ICSID, dated June 2nd, 1998, Claimant's counsel requested that a second arbitrator be appointed.

On June 11, 1998, the ICSID acknowledged receipt of KBC's request and sent copies of it to the Respondents. By letter of June 22nd, 1998, Claimant's counsel answered the questions raised by the ICSID as to KBC's request and provided documentation setting forth their authorisation to act on behalf of KBC. On June 23rd, 1998, ICSID acknowledged receipt of the documentation and sent it to the Respondents with a copy of Claimant's letter of June 22nd, 1998.

On June 29, 1998, ICSID Legal Adviser informed the parties that the Acting Secretary General of ICSID had decided to comply with KBC's request for appointment of an arbitrator, that it was considering to appoint Dr. Ahmed El Kosheri as co-arbitrator in the proceedings and asked their comments on this appointment by July 13, 1998.

On July 1st, 1998, Claimant informed ICSID that it had no objection to the above mentioned appointment. By letter dated July 13, 1998, ICSID Legal Adviser wrote to the parties stating that, by that date, he had not received any objection to Dr. EL KOSHERI's appointment from the Respondents. Therefore, he confirmed that the Acting Secretary General of

ICSID was proceeding to the appointment of Dr. EL KOSHERI as second arbitrator in the arbitral procedure.

On July 15, 1998, the ICSID Legal Adviser informed the parties that the Acting Secretary General of ICSID had appointed Dr. Ahmed S. EL KOSHERI as second arbitrator.

By letter dated July 23rd, 1998, Prof. Bernardini informed the parties that Mr. Yves DERAINS had been appointed as Chairman of the Arbitral Tribunal by Dr. El Kosheri and himself according to the authority granted to them by the arbitration clauses.

On the same date, the Department of Mines and Energy of the GOI wrote a letter to ICSID commenting Claimant's Notice for Arbitration. In this letter, the GOI stressed inter alia that no steps to settle the dispute amicably had been taken by KBC and that the GOI had never issued the purported letter of support referred to by KBC.

On July 24, 1998, Mr. Yves DERAINS informed the parties that he accepted his appointment as Chairman of the Arbitral Tribunal.

On July 27, 1998, PERTAMINA wrote to ICSID indicating that it did not receive its letters of June 11, 23rd and July 2nd, 1998. Furthermore, PERTAMINA alleged that, to date, there was no conflict between them and KBC and that its silence to the Notice of Arbitration could not be interpreted as a failure to appoint an arbitrator as it was still considering KBC's arbitration claim too early and inconsistent with the contracts. PERTAMINA stressed that KBC had neglected the amicable consultation provisions of the JOC and of the ESC and that no letter of comfort had been issued by the GOI in support of KBC. As such, PERTAMINA stated that it was challenging the jurisdiction of the Arbitral Tribunal unless an amicable settlement was attempted first.

On July 28, 1998, ICSID acknowledged receipt of PERTAMINA's letter and forwarded it to the Arbitral Tribunal. On the same date, PLN sent a letter to ICSID indicating inter alia that PLN had committed no contractual breach under the ESC and that no discussion for settlement had been attempted by KBC.

On August 4, 1998, ICSID acknowledged receipt of PLN's letter and forwarded it to the Arbitral Tribunal.

On September 18, 1998, the Chairman of the Arbitral Tribunal sent a letter to the parties indicating that the Arbitral Tribunal intended to hold a meeting in Geneva and that it would decide on the challenge of its jurisdiction within the course of the proceedings. Furthermore, pursuant to Article 15 of the UNCITRAL Rules, it invited the parties to submit all documents and information provided to the arbitrators to the other party as well.

On September 18, 1988 [sic], the Department of Mines and Energy of the GOI sent a letter to the Chairman of the Arbitral Tribunal stating that it could not give any response to the proposal of a meeting in Geneva as it challenged the jurisdiction of the Arbitral Tribunal until amicable settlement be attempted first by all the parties.

On the same date, PLN sent a fax to the Chairman of the Arbitral Tribunal indicating that the case brought against it involved a sovereignty matter beyond its control and that it was challenging the validity of the arbitral proceedings.

On September 30, 1998, the Department of Mines and Energy of the GOI wrote a letter stating that it could not participate in the meeting planned in Geneva.

On October 1st, 1998, PLN informed the Arbitral Tribunal that the law firm Adnan Buyung Nasution & Partners would act as counsel for PLN in the proceedings.

By October 6, 1998, the parties were informed by the Arbitral Tribunal that, in order to organise the procedure, the Arbitral Tribunal had decided to hold a meeting on November 19, 1998, in Geneva. Furthermore, on November 2nd, 1998, it informed the parties of the agenda of the meeting.

On November 3rd, 1998, PERTAMINA indicated that it would be represented by the law firm Adnan Buyung Nasution & Partners.

By a letter dated November 12, 1998, PERTAMINA and PLN's Counsel proposed some preliminary issues to be discussed at the November 19, 1998 Meeting. Then, on November 16, 1998 it indicated that Coudert Freres would act as co-Counsel in these proceedings.

In the meeting of the Arbitral Tribunal held in Geneva on November 19, 1999, the following persons participated :

For the Claimant : Mr. Dorian Lowell, Mr. Patrick Bryan, Mr. Carl Nichols and Mr. Jonathan D. Schiller.

For the Respondents: Dr. Adnan Buyung Nasution, Mr. Nugrahaningrum, Mr. William Laurence Craig, Mr. Michael S. Horn, Mrs. Cut Y. Riyanto, Mr. W. Sulaiman, Mr. P. Sunarko, Mr. Dicky Suryadi.

Powers of attorney were submitted by Counsel for the three Respondents.

On November 20, 1998, a Procedural Order n°1 was issued, stating that:

«*The Arbitral Tribunal has*,

1. Ordered Claimant to submit to the Chairman of the Arbitral Tribunal the original of the letter of support dated November 14, 1994, copy of which is attached to Claimant's Notice for Arbitration dated June 2nd, 1998 or of the document from which the copy was made;

Counsel for the Respondents will have access to this document at the Chairman's office in Paris and may take copy of it ;

2. Required the Claimant to provide the Chairman of the Arbitral Tribunal with the original of the power of attorney granted to BOIES & SCHILLER LLP, to represent it in the present arbitration and to send a copy to the other members of the Arbitral Tribunal and the Defendants.

3. Decided that a preliminary award will be made on the following issues:

** the exhaustion of the amicable settlement procedure,*

** the constitution of the Arbitral tribunal,*

** the determination of the proper parties to the present arbitration and under which contract, including the letter of support above referred to.*

4. Fixed the procedural time table applicable until the issuing of the preliminary award as follows:

** the Defendants will file a brief on the above referred preliminary issues by January 10, 1999 with all documents they are relying upon,*

** the Claimant will provide a reply within 45 days maximum from the receipt of the Defendant's brief, with all documents it is relying upon,*

** a hearing will then be held on March 10, 1999 in Paris.*

5. Contemplated a provisional time table for the continuation of the procedure in case the Tribunal would retain its jurisdiction as follows:

** the Claimant may, within one month from the rendering of the preliminary award, revise its Statement of Claim dated November 11, 1998,*

** the Defendants will then have two months to reply starting either from the receipt of the revised brief or from the notification by the Claimant that no revised brief will be filed,*

** the Claimant will submit a rebuttal to the reply of the Defendants within one month from receipt of that reply,*

** the Defendants will then submit a rejoinder to the Claimant's memorial within one month from receipt of that rebuttal.*

With all these written statements, the parties are entitled to provide any further documentary evidence ;

a hearing will then be held within one month after receipt of the last brief.

6. Proposed to refer to the scale of arbitrators' fees provided in the 1998 ICC Arbitration Rules to determine the arbitration fees and allowed the Defendants a 10 days period from the notification of the present Procedural Order n 1 to comment on writing on this issue, bearing in mind that the Claimant has indicated that it was in agreement with this proposal.

7. Declared that the amount of the provisional deposit equals to US$ 100.000 requested from the parties by the Arbitral Tribunal on November 2nd, 1998, was sufficient to cover the initial proceedings and the rendering of the above mentioned preliminary award.

8. Invited the parties to pay their respective portion of the deposit as provided by Article 41 (1) of the UNCITRAL Rules within a period of one month as from the notification of this Procedural Order. »

By December 1st, 1998, Claimant's Counsel sent the required document and an Officer's Certificate of KBC, and, by January 11, 1999, Respondents' Counsel sent its memorial on the preliminary issues.

As contemplated in Procedural Order n°1, Counsel for Respondents inspected in the Chairman of the Arbitral Tribunal's office the document submitted by Claimant's counsel with his letter of December 1st, 1998. This inspection took place on December 22nd, 1998.

On January 29, 1999, the Chairman of the Arbitral Tribunal confirmed that the hearing on preliminary issues would take place in Paris on March 10, 1999.

On February 16, 1999, Respondents' Counsel wrote to the Arbitrai Tribunal stating inter alia that Respondents had decided to appoint Masons as international Counsel instead of Coudert Freres. It also asked for the postponment [sic] of the hearing scheduled on March 10, 1999.

On February 18, 1999, Claimant's Counsel sent a letter commenting on the required postponment [sic] of the hearing and objected to it. It also stated that in case such extension would be granted, it was requesting an additional 45 days period to file its response on the jurisdictional issue.

By a letter dated March 9, 1999, the Chairman of the Arbitral Tribunal informed the parties that it had been decided to fix the hearing on May 31st, 1999 in Paris.

On April 13, 1999, Claimant's counsel advised that it intended to submit its memorial by May 3rd, 1999 and that, as such, the Respondents would have time enough to prepare for the hearing. The Arbitral Tribunal asked comments from Respondents by April 15, 1999, and, by a letter dated April 19, 1999, Respondents' Counsel answered that, due to national general elections to be held in Indonesia during the month of June and to its duties as Vice Chairman of the National Election Commission, it would be difficult for him to participate in the hearing. As such, it requested another postponment [sic] of the hearing to the Arbitral Tribunal.

Upon request for comments by the Arbitral Tribunal, the Claimant answered on April 20, 1999 that it was objecting to a new postponment [sic] of the hearing.

By April 29, 1999, the Arbitral Tribunal informed the parties that it had decided to maintain the May 31st, 1999 hearing as scheduled.

On May 31st, 1999, the hearing on preliminary issues took place in Paris. The following persons participated in the hearing:

For the Claimant : Mr. Jonathan D. Schiller, Mr. Carl Nichols, Mr. Patrick Bryan, Mr. Edward Tancer.

For the Respondents : Mr. Neil Kaplan QC, Mr. John Bishop, Mr. Mark Collingnood, Dr. Adnan Buyung Nasution, Mr. Yerri Anullah, Ir. Syafei Sulaiman, Dr. Z. Brori, Ms. Hanawati, Mr. Rex R. Panambunan.

Counsel for Claimant submitted a copy of a letter dated May 30, 1999, to Counsel for Respondents objecting to the admissibility of a witness statement by Mr. Umar Said, faxed to the Arbitral Tribunal and to Claimant's Counsel on May 28, 1999. Counsel for Claimant also objected to the submission by Counsel for Respondents of a bundle in four volumes, including new authorities.

The Arbitral Tribunal stressed that the Respondents could have submitted Mr. Umar Said's witness statement months before, that nobody had had sufficient time to carefully study it and that the witness was not available for cross-examination. Thus, it decided that this witness statement was not admissible.

Regarding the bundle submitted by Respondents, the Arbitral Tribunal decided to accept it, reserving the possibility to let Claimant comment in writing on the new authorities included in the bundle. The Claimant decided not to use this possibility.

At the end of the hearing, the Arbitral Tribunal informed the parties that the debates were closed but authorised the parties to present a statement of their legal costs.

On June 1st, 1999, Minutes of the hearing were sent to the parties.

The Respondents sent a note with their legal costs on August 9, 1999.

The Claimant commented that note on August 10, 1999 and submitted its legal costs. By a fax of August 12, 1999, the Respondents declared that they did not intend to reply to the Claimant's note of August 10, 1999.

III—DISCUSSION

As resulting from the parties memorial and their oral pleadings at the May 31st, 1999 hearing, the preliminary issues to be decided in this award concern the following matters:

—the exhaustion of the amicable settlement procedures ;

—the consolidation of KBC's claims into a single arbitration;

—the constitution of the Arbitral Tribunal ;

—whether the GOI is a proper party to this arbitration.

The Respondents have raised the above mentioned four preliminary issues. Thus, for each of them, their position will be presented first, followed by the Claimant's position.

The fourth question has to be decided first, as a decision in this respect may have some relevancy when deciding the three other preliminary issues.

Finally, the Arbitral Tribunal will make a determination as to the costs at this phase of the proceedings, as requested by the parties.

A—IS THE GOVERNMENT OF INDONESIA A PROPER PARTY TO THIS ARBITRATION ?

(1) *The Respondents' position*

As expressed in its memorials and at the May 31st, 1999 hearing, the Respondents' position may be summarily described as follows.

The Respondents allege that the GOI is not a party to the arbitration under the ESC and the JOC contracts, and that it did not became a party afterwards. The contracts were approved by a Minister, the Minister of Mines and Energy who signed the contracts under the word « *approved* ». The approval by a Minister for a State controlled enterprise to enter into a contract concerning natural resources is a normal Minister's surveillance power and it does not make the Government party to the contract or submit it to a contractual obligation to arbitration : nor his signature constitutes an independent guarantee of results by the Government.

Moreover, the Respondents state that, despite a specific request, KBC has not produced the original of the alleged letter of support by the Government. In fact, the copy of the letter of support which has been submitted is showing no legible signature. As such, in the absence of any proof that an agreement to arbitrate was entered into between KBC and the GOI, the arbitration against the latter may not proceed on the basis of any alleged letter of support.

Furthermore, the Respondent adds that the text of the alleged letter of support neither obligates the GOI as an obligor, nor guarantees any of PERTAMINA's or PLN's obligations to KBC and could not be the basis of a claim against it. Rather, the alleged letter of support states that the GOI was aware of the terms of the contracts and will « *cause* » PERTAMINA and PLN to discharge their payment and obligations. It cannot be considered as a letter of guarantee and is not a waiver of the GOI's right to exercise its sovereign rights.

In the event the alleged letter of support would be recognised as existing and obliging the GOI to arbitrate, KBC's claim would be premature until it has been found that PERTAMINA or PLN's obligations are « *due, payable and/or unsatisfied*».

(2) *The Claimant's position*

As expressed in its memorials and at the May 31st, 1999 hearing, the Claimant's position may be summarily described as follows.

The contention that the GOI is not a proper party to the arbitration is wrongful. Claimant alleges that the GOI is a party both because PERTAMINA and PLN were acting as its agent/ alter ego in the JOC and the ESC and because KBC had made a sufficient prima facie showing of an agreement with the GOI containing an arbitration clause, i.e. the letter of support, which the GOI has not rebutted.

Claimant states that where the signatory to an arbitration clause is merely the agent, or the alter ego, of a third party, such third party is just subject as much to the arbitration clause as the signatory. It is particularly the case when the third party is the sole shareholder of the signatory and has itself, by its actions or orders, caused the subsidiary to commit the breach of contract which is the subject of the arbitration.

Regarding PERTAMINA, Claimant states that it is 100% owned by the GOI and its capital is not divided into shares. Furthermore, its Directors report to a Board of Commissioners, comprised entirely of Government Ministers, that is responsible to the President of Indonesia, including the Minister of Mines and Energy as Chairman, the Minister of Finance, the Minister State Secretary and the State Minister of Research and Technology. Thus, PERTAMINA is an instrumentality of the GOI.

Moreover, PERTAMINA's capital structure is evidencing that it is not distinguishable from the GOI. In effect, gross income due to PERTAMINA under its production sharing contracts with foreign contractors is not paid directly to PERTAMINA but to the GOI. PERTAMINA then receives an allocation from the GOI.

Concerning PLN, Claimant states that it is also 100% owned by the GOI and receives massive annual subsidies from the GOI. As such, PLN is a mere instrumentality of the GOI.

Furthermore, Claimant stresses that the GOI was an active participant in the conclusion (the JOC and the ESC were not only approved by the GOI, but signed on the signature page under the word « *Approved* ») and the performance of the JOC and the ESC and thus it was the direct cause of the suspension of the project.

Claimant contends that the November 1994 letter of support provided by the GOI for the project should be considered as a basis for the Tribunal's jurisdiction over the GOI.

Claimant states that the copy of the support letter is a sufficient prima facie evidence of the existence of this letter and that the Respondents' assertions about its legibility should not rebut its existence. This copy is a sufficient basis and Claimant respectfully requests to seek a discovery order against GOI and to present oral evidence respecting the letter's making and existence. Claimant asserts that the text of the support letter is readable and that the signatory is identified under the signature as the Minister of Mines and Energy signing on behalf of the GOI. Thus, there should be no question as to whose signature is on the support letter.

To the argument of the Respondents that an arbitration under the letter of support would be premature, Claimant replies that to the extent PERTAMINA/PLN have breached the JOC and the ESC, the GOI has also breached the letter of support

by not having caused PERTAMINA/PLN to comply with their obligations.

(3) *The Arbitral Tribunal's decision*

It is not disputed that the GOI is not named as a party in the JOC or in the ESC.

The argumentation presented by the Claimant in support of its submission that the GOI is nevertheless a party in this arbitration is grounded on three different allegations. One is that the GOI is bound by its signature on the JOC, the ESC and the letter of support, which contains an arbitration clause ; an other is that PERTAMINA and PLN are agents or alter ego of the GOI ; the third allegation is that the GOI played a prominent role in the conclusion, the performance of the contracts and in the alleged breach thereof which is the subject of this arbitration. In fairness, it must be added that it often mixes these three lines of justification. However, the Arbitral Tribunal must assess separately the value of each of these lines of allegations.

As a matter of fact, should the GOI be a proper party to this arbitration because it has apposed its signature on the JOC, the ESC and/or has issued the alleged letter of support, it would be unnecessary to consider whether it might be a proper party on the basis of any other justification. Thus, these points have to be considered first.

It is common ground that the Minister of Mines and Energy of the Government of Indonesia, Mr. J.B. Sudjana, has affixed his signature both on the JOC and the ESC, after the mention:

«*Approved by the Minister of Mines and Energy. . . . .on behalf of the GOVERNMENT OF THE REPUBLIC OF INDONESIA* ».

According to Claimant, this is an unusual step in Indonesian contractual formation of contracts. The Arbitral Tribunal does

not know whether such way of approval by the Government of contracts of national interest is unusual in Indonesia, but it is a straightforward feature of contracts concluded by State-Owned enterprises throughout the world. A famous example is provided by the contract made by a private investor, SPP, and the Egyptian State Organisation for Tourism and Hotels which was « *approved, agreed and ratified* » by the Egyptian Minister of Tourism (cf. Yearbook Commercial Arbitration, XIII, 1988, p.149). More significantly in the instant case, such approval was expressly contemplated by both the JOC (art.1.2.) and the ESC (Section 2) which respectively provide:

JOC : « *Effective date means the date this Contract is approved by the Minister of Mines and Energy of the Republic of Indonesia* ».

ESC : « Effective date shall mean the date upon which the Minister of Mines approves this Contract by his signature of the Contract ».

It results from the text of both contracts that they could not become effective without the approval of the Minister which was the starting point for calculating the term of the contract (JOC of the Contract, art. 2.1. ; ESC, Sect.3). The ESC precises that the form of the approval is its signature by the Minister. Thus, the very purpose of the Minister's approval is clearly defined: it is a condition precedent to the entering into force of the JOC and the ESC. This is a clear indication that the parties did not consider that the GOI was also a party to the contracts. Indeed, it would be unreasonable to admit that KBC would have accepted that the effectiveness of the contracts would depend on their approval by one of the parties thereto. Moreover, as rightly stressed by Berthold Goldman, « *the approval is an act exterior to the undertaking itself* » (B. Goldman, comments to the decision of the Court of Appeals of Paris, July 12, 1984 in the case Arab Republic of Egypt vs. SPP Ltd and SPP (Middle East), Clunet 1985, p.129). Within the framework of its duty to control State-

Owned Companies and agreements involving the energetical resources of the country, the Minister of Mines and Energy of the Republic of Indonesia was authorising the implementation of the contracts agreed upon by the parties. It was not expressing the will to become a party to them and this could not be the understanding of KBC.

Furthermore, the Arbitral Tribunal cannot see in the so-called letter of support submitted by the Claimant a valid basis for retaining the GOI as a party to this arbitration proceedings [sic]. Although it was expressly granted the opportunity to do so, the Claimant has been unable to provide the original of the photocopy of the document which it has produced. Moreover, the signature appearing on this photocopy is hardly readable. The GOI denies having issued this document and challenges its authenticity.

The Arbitral Tribunal is amazed that an experienced company such as KBC either did not require an original of a letter expressing an undertaking of the GOI, which would have obviously been of great importance for it, if actually issued, nor kept it in its files if such original was remitted. Consequently, serious doubts exist as to the origin and authenticity of the so-called letter of comfort. In the circumstances, the Arbitral Tribunal may not take it into consideration nor order discovery on the basis of the photocopy submitted.

In conclusion, the Arbitral Tribunal is not satisfied that it has jurisdiction over the GOI neither because of the approval of the JOC and of the ESC nor on the basis of the so-called letter of support. However, the Arbitral Tribunal acknowledges that a party may be declared to be a party to a contract and to the arbitration agreement included therein, although that party has not signed such contract and an arbitration clause. It may be the case when the party which did sign the contract was the agent or the alter ego of the non signatory or when the non signatory played a prominent role in the conclusion, performance and termination of the contract, if any, such as

being seen by the other party as its main counterpart (see ICC Case n°4131 (1982), Collection of ICC Arbitral Awards 1974-1985, 464 ; ICC Case n°5103 (1988), Collection of ICC Arbitral Awards 1986-1990, 361 ; ICC Case n°6519 (1991), Collection of ICC Arbitral Awards 1991-1995, p.20).

Doubts have been expressed whether such solutions may be applied to a State, when the contract including the arbitration clause has been executed by a State-Owned company (see for instance Ph. Leboulanger, « Groupe d'Etats et arbitrage », Rev. Arb. 1989, 415). In this respect, the Arbitral Tribunal considers that a case by case approach is necessary. Confronted with a similar problem, the Swiss Federal Court, in its April 19, 1994 decision, rendered in the Wesland Case, pointed out that « *contractual links may be created, although it does not results from the internal intention of a party, when this party adopt a behaviour which authorise the other party to bona fide deduce the existence of such an intention* » (cf. Bulletin ASA, 1994, p.422). Thus, the basic question is whether KBC could bona fide consider that the GOI was party to the JOC and the ESC and to the arbitration agreement included in each of them.

The fact that both PERTAMINA and PLN are fully owned by the GOI would favour such conclusion. This is even more significant in the case of PERTAMINA, the capital of which is not divided into shares. Moreover, its Board includes various Ministers. In such circumstances, many contractors could have generally believed that their counterpart was actually the GOI. However, the very wording of the JOC and the ESC is incompatible with such belief. The Arbitral Tribunal has already showed that the requirement that these contracts be approved by the Minister of Mines and Energy to become effective far from making the GOI a party to these contracts was a clear indication that the GOI remained exterior to them : the effectiveness of a contract cannot depend on its approval by one of the parties. But other

provisions of the JOC and the ESC confirm that KBC never considered that the GOI was party thereto.

Both the JOC and the ESC contain a definition of « *party* » and « *parties* ».

In the JOC, it reads:

« *Party* » *mean PERTAMINA or CONTRACTOR as the case may be and* « *parties* » *shall mean PERTAMINA and CONTRACTOR* ».

In the ESC, it reads

« *Party*» *shall mean any of PLN, PERTAMINA or COMPANY as the case may be, and* « *parties* » *shall mean all of PLN, PERTAMINA and COMPANY* ».

The GOI is not mentioned among the parties but this has little relevancy to the discussion since KBC's allegation is that PERTAMINA and PLN were agent or alter ego of the GOI. What is more relevant is that both the JOC and the ESC provide also a definition of the Government.

In the JOC, it reads:

«*Government* » *shall mean the Government of the Republic of Indonesia, including all national, regional and local subdivisions, agencies and instrumentalities thereof* ».

In the ESC, it reads:

«*Government* » *shall mean the Government of the Republic of Indonesia, including all national, regional and local subdivisions, agencies and instrumentalities thereof and any and all duly authorised agents of the foregoing* ».

The conclusion is that when drafting the JOC and the ESC, the parties wanted to establish a distinction between PERTAMINA and PLN on the one hand and the GOI on the other hand. It also reveals that the parties did consider the question and decided not to treat PERTAMINA and PLN as

« *instrumentality* » of the GOI, the very term now used by KBC to describe both of them. Moreover, the parties took care of the close relation of PERTAMINA and PLN with the GOI. They included in both contracts a definition of « *Government related Event* » and, in both contracts, the Force Majeure clause indicates that a « *Government related Event* » is an event of Force Majeure with respect to KBC only. This has two consequences for the interpretation of the parties' intention. On the one hand, they were acknowledging that PERTAMINA and PLN had such a close relation with the GOI that a decision of the latter was not a Force Majeure event for them; on the other hand, they were confirming that the GOI was not a party to the contracts since a governmental decision which prevents KBC to perform its obligations is not deemed to be a breach of contract by PERTAMINA or PLN but a Force Majeure event excusing KBC's non performance.

Likewise Article 11.2 (a and c) of the JOC obliges PERTAMINA to assist KBC in its relations with the GOI and Section 4.3 (II) of the ESC requires PLN to assist KBC in obtaining « *letters of support from the Government in form and substance that is reasonably acceptable to actual or potential leaders of the Company*». The indication that PERTAMINA and PLN have an obligation to assist in obtaining actions from the GOI is a further evidence that KBC made a clear and precise distinction between the parties to the contracts and the GOI. Otherwise, PERTAMINA and PLN obligations would not have been obligations of assistance in dealing with the GOI but obligations to deliver what was expected from the GOI.

On the basis of the above, the Arbitral Tribunal is satisfied that KBC did not consider that the GOI was a party to the JOC and the ESC when it entered into these agreements. KBC confirmed such understanding afterwards. For instance, in its letter of February 10, 1998 to PERTAMINA and PLN,

KBC treats the issuance of Presidential Decrees 5/1998 and 39/1997 as an event of Force Majeure.

In the circumstances, the Arbitral Tribunal decides that the GOI is neither a party to the JOC nor to the ESC. Consequently, it is not bound by the arbitration clauses included in the contracts. The Arbitral Tribunal has no jurisdiction over the GOI which may not be retained as a party in this arbitration.

B—THE EXHAUSTION OF THE AMICABLE SETTLEMENT PROCEDURES

(1) *The Respondents' position*

As expressed in its memorials and at the May 31st, 1999 hearing, the Respondents' position may be summarily described as follows.

This case is not ripe for arbitration because KBC has not exhausted amicable settlement procedures. Where an arbitration clause contains a formal pre-arbitration settlement procedure, any attempt to bring arbitration without complying with that condition is premature. In the present case, KBC did not comply with the settlement attempt provisions of Article 13.1 of the JOC and Section 8.2 of the ESC. Under article 13.1 of the JOC, thirty days of amicable settlement procedures must be undertaken between a Notice of Dispute and the commencement of an arbitration. This requirement is phrased in mandatory terms : « *the parties shall attempt, for a period of thirty (30) working days . . . . to settle such dispute* ».

The same requirement is imposed by the ESC. Specifically, Section 8 of the ESC requires, in mandatory terms, that the parties undertake forty five days of settlement discussions : « *the parties shall attempt, for a period of forty five (45) calendar days . . . . to settle such dispute* ».

No dispute in writing was referred to the Respondents as no notice of dispute was contained in KBC's letter to PLN dated February 10, 1998. KBC stated that the issuance of Presidential Decrees of September 20, 1997 and January 10, 1998 constituted « *Government related Events* » under the contracts and thus constituted Force Majeure. This letter stated that KBC had no intention to assert any claim against PLN or PERTAMINA.

Furthermore, by its letter dated March 6, 1998, PLN informed KBC of its intent to comply with the Presidential Decrees but it did not receive any response from KBC until April 30, 1998 when the later filed its Notice for Arbitration.

Following the receipt of the Notice for Arbitration, the Respondents stated to Claimant that the amicable settlement procedure had not been attempted and that they objected to the institution of the arbitration proceedings.

On September 18, 1998, PLN and the GOI confirmed this position to the Arbitral Tribunal.

In addition, the Respondents allege that KBC prevented any subsequent discussions, including settlement discussions inasmuch as, since the beginning of the arbitration, KBC's Counsel forbade Respondents from directly contacting representatives of KBC. This behaviour was in direct opposition to the settlement procedures set forth in the JOC and in the ESC.

Clauses which require pre-arbitration dispute resolution as a condition to the right to bring arbitration and thus as a condition to the jurisdiction of the arbitral tribunal, are enforceable. The further obligation to give notice and seek discussions in view of amicable settlement has been widely recognized as a prerequisite of an arbitral tribunal's jurisdiction. With the detailed pre-arbitration dispute resolution clauses in the contracts the parties had expressly made exhaustion of active negotiation attempts a pre-condition to the jurisdiction of the Arbitral Tribunal. The Respondents

support this conclusion by making reference to Swiss law as the JOC and the ESC provide for UNCITRAL Arbitration in Geneva between parties which are neither Swiss nor Swiss resident. As a result, and under both contracts, the arbitration proceedings are governed by Chapter 12 of the Swiss Private International Law Statutes. Under Swiss law, the Arbitral Tribunal is lacking jurisdiction because KBC failed to comply with the contractual prerequisites to arbitration.

The arbitral clauses cannot be applied as KBC filed its Notice for Arbitration when the arbitration clauses were not yet in effect.

Therefore, KBC's claims should be dismissed without prejudice to KBC's right to later commence arbitration in compliance with the arbitration clauses.

The Respondents also state that an evaluation of all the circumstances is important to determine whether an obligation to undertake settlement discussions will serve as a bar to the processing of a claim in arbitration. In this case, KBC should have consulted and discussed with PERTAMINA and PLN in order to seek to save the essence of their contracts in the face of fundamentally changing circumstances. KBC's premature arbitration appears to be part of a tactic to bring a de facto termination of these contracts.

(2) *The Claimant's position*

As expressed in its memorials and at the May 31st, 1999 hearing, the Claimant's position may be summarily described as follows.

KBC has complied with all the applicable pre-arbitration procedures as Article 13 of the JOC and Section 8 of the ESC provides that, « *when a dispute arises, the parties should attempt to settle in the first instance « by mutual discussions »*. If it cannot be settled within the respective time limit contemplated by each clause (the JOC: 30 days; the ESC: 45

days), then it must be « *finally settled* » by arbitration, the running event of time limit periods being the « *receipt* » by one party of a « *notice* » from another party « *of the existence of a dispute* ».

These conditions have been satisfied. In effect, two days after the September 97 decree, KBC notified PERTAMINA in writing, with copy to PLN, that the project suspension was an « *error* », pointing out that neither the JOC nor the ESC permitted suspension and requesting that this « *error be redressed* ». Representatives of the GOI were notified in writing, including the Minister of Mines and Energy, the Coordinating Minister for the Economy, the Chairman of the National Planning Agency and the special Advisor on the Economy to Indonesian President Soeharto. During this period, KBC also met with representatives of PERTAMINA, PLN and the GOI, with some success as the November 1st, 1997 Decree revoked the Project suspension.

After the January 98 Decree, KBC notified again PERTAMINA, PLN and the GOI that the suspension was « *an error* ». By February 11, 1998, KBC sent a formal written notice to PERTAMINA and PLN, with copy to the Ministers of Mines, Planning and Finance stating that it might assert claims against PERTAMINA and PLN and proposed that the parties meet to discuss the situation. However, neither PERTAMINA nor PLN answered.

It is the Claimant's view that even in the absence of others [sic] letters notifying PERTAMINA, PLN and the GOI that KBC disputed the project suspension and the consequences there-from [sic], the February 10, 1998 notice was sufficient to satisfy the pre-arbitral notice requirement of the arbitration clauses.

However, the Respondents were fully aware of the dispute. On February 11, 1998, PERTAMINA sent a note to the Chairman of the GOI's National Planning Agency, indicating

inter alia, that « *there is a chance for the Contractors to file a suit against the Government, through international arbitration as the suspension review to the Project status has breached the agreements mutually agreed/secured by the Minister of ME, besides the guaranty in the form of Comfort Letter from the Minister of Finance* ».

On March 6, 1998, PLN simply ordered KBC to abide by the suspension Decrees.

On March 19, 1998, the Respondents sent to KBC copy of their letter dated February 11, 1998 to the National Planning Agency warning the latter that the suspension could lead to international arbitration and it indicated to the Claimant that it would « *arrange the meeting for three parties as soon as possible* ». However, the meeting did not occur and, on April 30, 1998, more than 210 days after its September 26, 1997 notice, and more that 75 days after its February 10, 1998 Notice, KBC presented its Notice for Arbitration against the Respondents.

Thus, the Claimant's conclusion is that this Notice for Arbitration was served after full compliance by KBC with the pre-arbitration settlement procedures specified in the arbitration clauses.

(3) *The Arbitral Tribunal's decision*

The Respondents' contention that the Arbitral Tribunal would lack jurisdiction because the amicable settlement procedures contemplated in both the JOC (Article 13.1) and the ESC (Section 8.2) have not been respected raises two different types of problems. A first question is to decide whether such contention is factually correct; in the affirmative only, a second question would be to decide whether the breach of amicable settlement procedure by a party deprives that party of the right to resort to arbitration.

Since the Arbitral Tribunal has found that the GOI could not be retained as a party in this arbitration, the respect of the amicable settlement procedures with respect to the GOI has not to be taken into consideration.

Article 13.1 of the JOC reads:

« If any Dispute or difference of any kind whatsoever (a « Dispute ») shall arise among the Parties in connection with, or arising out of, this Contract, or the breach, termination or validity hereof, the Parties shall attempt, for a period of thirty (30) working days after the receipt by one Party of a notice from the other party of the existence of a Dispute, to settle such Dispute in the first instance by mutual discussions among the Parties ».

Section 8.1 of the ESC reads:

« If any Dispute or different of any kind whatsoever (a « Dispute ») shall arise among the parties in connection with, or arising out of, this Contract, or the breach, termination or validity hereof, the parties shall attempt, for a period of forty-five (45) calendar days after the receipt by one Party of a notice from another party of the existence of a Dispute, to settle such Dispute in the first instance by mutual discussions among the Parties ».

Then, Article 13.2 of the JOC and 8.2 of the ESC respectively indicate that, if the dispute cannot be settled by mutual discussions within the period contemplated for them, the dispute will be settled by arbitration.

The Arbitral Tribunal is satisfied that the conditions laid down in the above mentioned provisions have been respected. It is of the opinion that the letter sent by KBC to PERTAMINA and PLN on February 10, 1998 has the characteristic required of the notice to a party of the existence of a dispute. In this letter, KBC gave notice of the existence of a Force Majeure events [sic] under both the JOC and the ESC and

reserves its rights to assert any and all claims it may have against PERTAMINA and PLN, with particular emphasis to the losses suffered by KBC as a result of the postponment [sic] of the project. KBC stresses that it wishes to meet with PERTAMINA and PLN « *on a regular basis to review the situation* » and urge them to use their « *best efforts to bring about the continuation of the project* ». In a nutshell, this letter individualises an event which allegedly caused damages to KBC, reserves its rights to claim against PERTAMINA and PLN for such damages and requests that discussions take place. It is a fact that this letter does not refer expressly to Article 13 of the JOC or Section 8 of the ESC. However, it corresponds to what Article 13.1 of the JOC and Section 8.1 of the ESC describes as a notice of the existence of a dispute or difference of any kind whatsoever.

There is no allegation that when KBC served a Notice for Arbitration on the Respondents on April 30, 1998, PERTAMINA and/or PLN had accepted to make their best efforts to obtain that the project be continuated [sic] and to compensate KBC for damages resulting from its discontinuation. On the contrary, on March 6, 1998, PLN wrote to KBC that the Presidential Decrees postponing the project should be respected. Moreover, while it is a fact that KBC proposed discussions in its February 10, 1998 letter, there is no allegation that KBC has any responsibility for the absence of such discussion or their failure.

On April 30, 1998, the 30 days and the 45 days following the February 10, 1998 notice, respectively requested by the JOC and the ESC, had elapsed. Thus, KBC was entitled to start arbitration proceedings on the basis of article 13.2 of the JOC and Section 8.2 of the ESC.

In these circumstances, the Arbitral Tribunal cannot accept the Respondents' objection to its jurisdiction for lack of respect of the amicable settlement procedures contemplated by the arbitration clauses.

C—THE CONSOLIDATION OF KBC'S CLAIMS INTO A SINGLE ARBITRATION

(1) *The Respondents' position*

As expressed in its memorials and at the May 31st, 1999 hearing, the Respondents' position may be summarily described as follows.

The Respondents contends [sic] that KBC could not claim under three separate agreements against three separate Respondents in one arbitral proceedings [sic]. First, because the JOC foresees disputes between KBC and PERTAMINA in which PLN has no interest or standing. Second, the ESC only foresees disputes between KBC and PERTAMINA on the one hand, and PLN on the other. The ESC arbitration clause was only considering actions between the seller and the party interested in the sale on the one hand and the purchaser on the other. Thus, any action against PLN presupposes that it had been first determined that KBC had completed a unit capable of selling, via PERTAMINA, electricity to PLN or that the latter was contractually responsible for KBC's inability to do so.

Furthermore, the Respondents confirm that they dispute the existence and the obligatory nature of KBC's further claims against the GOI under the *« letter of assurance »* (sic). Be that as it may, neither PLN nor PERTAMINA have agreed to arbitrate together with the GOI and any attempt to consolidate KBC's dispute with the GOI with a dispute against PERTAMINA and/or PLN should be rejected.

The Respondents also state that, under the arbitration agreements and Swiss law, the arbitrators have no power to consolidate the three separate disputes in single arbitral proceedings without the consent of all parties. Neither the arbitration clauses include any provision for consolidation nor the UNCITRAL Rules grant an arbitral tribunal the power to consolidate proceedings arising between parties under differ-

ent contracts. Such power cannot be found under Swiss Law either. Where no provision for consolidation is included in the applicable arbitration rules, consolidation by an arbitral tribunal can be justified only where there are only the same parties to different contracts and the tribunal finds that the parties intended that the dispute be considered as a whole by the same tribunal at the same time. In the absence of an explicit or implied agreement to consolidate disputes under separate agreements involving the same parties, the tribunal must not consolidate. It is even more so in the case of multiple parties and interrelated contracts where each dispute must be separately settled as provided in the separate arbitration clauses.

In any event, the Respondents underscore that there is a necessity to determine the issues under each contract separately.

(2) *The Claimant's position*

As expressed in its memorials and at the May 31st, 1999 hearing, the Claimant's position may be summarily described as follows.

Contrary to the Respondents' allegations, the disputes under the respective contracts should be adjudicated in a single arbitration because the parties so intended and the arbitrators were given the power to do so.

In effect, Claimant states that the parties intended that the disputes, under the JOC, the ESC and the letter of support, be adjudicated under one single arbitration. Under Indonesian law and international arbitration principles, the arbitrators must construe the arbitration clauses by reference to the common intent of the parties. Article 1343 of the Indonesian Civil Code provides that the primary rule for interpreting a contract is to ascertain the common intention of the parties. Here the intent of the parties was to adjudicate disputes under the JOC, the ESC and the letter of support in a single

arbitration and this intent was manifested by the integrated nature of the contracts and the language of the arbitration clauses, the JOC in its article 1.2. and the ESC in its section 15.3, being integrated agreements.

Moreover, Claimant alleges that the respective arbitration clauses are identical in form, substance and language. Therefore, the parties anticipated and provided for the present situation.

Claimant also contends that the Arbitral Tribunal has power to adjudicate all disputes at issue in a single arbitration in accordance with the UNCITRAL Rules, to which all parties have agreed and because the parties granted ex aequo et bono authority to the arbitrators in article 13.2 (b) of the JOC and Sect. 8.2 (b) of the ESC. Furthermore, the adjudication of the disputes in a single proceeding would not result in any inequality nor diminution of the respective rights of the parties to fully present their case.

Should the Arbitral Tribunal decide to break the present arbitration into three separate proceedings, as requested by the Respondents, the arbitrators in each of the separate proceedings would be the same as the arbitrators constituting the present Arbitral Tribunal since they have already been appointed in accordance with the requirements of each specific clauses.

(3) *The Arbitral Tribunal's decision*

Two preliminary remarks are necessary. As the Arbitral Tribunal has decided that the GOI could not be retained as a party in this arbitration, the question to be solved is whether KBC was entitled to act against PERTAMINA and PLN in a single arbitration, irrespective of its action against the GOI. Moreover, contrary to KBC's views, the Arbitral Tribunal does not find in both Article 13.2 of the JOC and Section 8.2 of the ESC a solution to the problem at stake. The Arbitral Tribunal will refrain to decide at this stage whether the

wording of these provisions grants it the power to act ex aequo et bono. Even if it did, it would not help in the discussion because it would remain to be decided whether such power, which pertains to the merits of the dispute, must be exercised in two separate arbitration or may be used in a single one.

At the outset, the Arbitral Tribunal must state that, leaving apart the question of the regularity of its constitution, which will be dealt with later on in this award, the question is not whether it has jurisdiction over PERTAMINA and/or PLN. Both of them are bound by an arbitration clause. Each arbitration clause provides for an arbitration in Geneva, according to the UNICTRAL Rules and their detailed provisions are almost the same. Indeed, the submission to this Arbitral Tribunal of claims by KBC against PERTAMINA on the basis of Article 13.2 of the JOC would not raise any problem. Likewise, the submission of claims by KBC against PLN and PERTAMINA on the basis of Section 8.2 of the ESC would not raise any problem either, leaving apart the question of the regularity of the constitution of the Arbitral Tribunal which has already been mentioned. The Arbitral Tribunal does not accept that the parties wished to limit the scope of their arbitration clause in the ESC to disputes opposing KBC and PERTAMINA to PLN. This is incompatible with the text of Section 8 of the ESC and with the spirit of the whole agreement. Section 8 (1) of the ESC refers to « *any dispute or difference of any kind whatsoever (a Dispute). . .* » arising among « *the Parties* ». According to Section 3, « *Parties shall mean all of PLN, PERTAMINA and COMPANY* ». Thus, when Section 8 (2, a) provides that any unsolved « *Dispute* » will be submitted to arbitration, it contemplates « *any Dispute or difference of any kind whatsoever* » among « *the Parties* », i.e. PLN, PERTAMINA and KBC. As the position and responsibility of each party under the ESC are different, disputes were likely to arise not only between KBC and PERTAMINA on the one hand and

PLN on the other hand, but also between two of the parties or between KBC and PLN against PERTAMINA or between KBC on the one hand and PERTAMINA and PLN on the other. This last configuration was the more probable as both PERTAMINA and PLN are owned by the GOI and, thus, have common interests.

The question to solve is only whether KBC could validly act against PERTAMINA and PLN in a single arbitration pursuant to the two arbitration clauses included in the two contracts.

The Arbitral Tribunal accepts KBC's position according to which a party may act against several parties bound by different but similar arbitration clauses. As explained by the Swiss Federal Tribunal in its decision of July 19, 1988 in the famous Westland Case (Rev. Arb. 1989, p.514), the validity of such a single action depends on the connexity [sic] of the claims and of appropriateness (« opportunité »). However, as stressed by the Swiss Federal Court in this decision, the positions of the parties in the disputes remain independent as to the substance of the claims.

Consequently, KBC's action in a single arbitration would be admissible in case of connexity [sic] of the legal relations between KBC and PERTAMINA on the basis of the JOC on the one hand, and between KBC, PERTAMINA and PLN on the basis of the ESC on the other hand. However, the use of the word connexity [sic] to describe the relationship between the JOC and the ESC would be an understatement. In reality, the two contracts are integrated.

The JOC and the ESC were entered into on the same day, November 28, 1994.

Article 1.2 of the JOC states

«Energy Sales Contract » means any and all contracts among PERTAMINA as seller, CONTRACTOR as deliverer and PLN

or other Buyer as purchaser of Electricity, or of Geothermal Energy produced from the Contract Area to be utilised for conversion to electricity, which is supplied to such Buyer pursuant to Geothermal Operations. Each such Energy Sales Contract shall be an integral part of this contract, and to the extent the provisions of the Energy Sales Contract obligate the Parties hereto, shall be deemed incorporated into this contract for all purposes ».

Section 3 of the ESC refers expressly to the JOC as follows

« Joint Operation Contract » shall mean that certain Joint Operation Contract dated as of. . . . . ., 1994 between PERTAMINA and COMPANY ».

Eventually, Article 15.3 of the ESC provides that « *the term of this Contract and the Joint Operation Contract constitute the entire agreement between the parties hereto. . . . ».*

It results from these provisions that the parties did not contemplate the performance of two independent contracts « *but the performance of a single project consisting of two closely related parties* », to borrow a formula used by the ICSID Arbitral Award of February 25, 1988 in the SOABI case (Yearbook Commercial Arbitration, 1992, p.53). In such circumstances, the conclusion of this Arbitral Tribunal is that KBC's single action should be admitted, provided it is appropriate. The Arbitral Tribunal has not the slightest doubt in this respect. Due to the integration of the two contracts and the fact that the Presidential Decrees, the consequences of which are at the origin of the dispute, affected both of them, the initiation of two separate arbitrations would be artificial and would generate the risk of contradictory decisions. Moreover, it would increase the costs of all the parties involved, an element of special weight in the light of difficulties faced by the Indonesian economy, to which counsel for the Respondents legitimately drew the Arbitral Tribunal's attention.

In conclusion, the Arbitral Tribunal is satisfied that KBC was entitled to initiate a single arbitration procedure against PERTAMINA and PLN, on the basis of two separate arbitration clauses. However, as mentioned above, the position of each party has to be considered independently when discussing the substance of the case, on the basis of their respective legal and contractual situations.

D—THE CONSTITUTION OF THE ARBITRAL TRIBUNAL

(1) *The Respondents' position*

As expressed in its memorials and in the May 31st, 1999 hearing, Respondents' position may be summarily described as follows.

The Respondents state that, by presenting a consolidated claim against them, KBC has retained the right, as a single party, to name an arbitrator and has forced the Respondents, which may have conflicting interests, to jointly nominated [sic] one. As such, the Respondents have been treated unequally. As they were unable to make the choice of one arbitrator, the appointing authority made it in their place instead. Such solution is not acceptable under the applicable Swiss law.

Moreover, the Respondents allege that even in the context of a consolidated arbitration, the present Arbitral Tribunal has been improperly constituted. Article 8 of the ESC provides a precise mechanism for the constitution of a three person arbitral tribunal: « *PLN on the one hand and COMPANY and PERTAMINA on the other hand will each appoint one arbitrator* ». KBC exercised the right to choose an arbitrator alone and did not comply with the terms of the arbitration clause providing for a joint appointment by KBC and PERTAMINA. This fact cannot be accepted by the tribunal and must lead to the decision that the arbitration, under the ESC, cannot proceed, whether there is a consolidation or not.

(2) *The Claimant's position*

As expressed in its memorials and in the May 31st, 1999 hearing, the Claimant's position may be summarily described as follows.

Contrary to the Respondents' assertions that the Arbitral Tribunal has been improperly constituted as they were forced to jointly name a single arbitrator, thus treated unequally as to KBC, Claimant alleges that the Respondents were not forced to jointly name a single arbitrator and that KBC had no duty to consult PERTAMINA before choosing an arbitrator.

In effect, the nomination of a single arbitrator by the ICSID Secretary General on behalf of the Respondents was only due to the Respondents' failure to exercise their right within the 30 days period. Furthermore, the ICSID Secretary General informed the Respondents that he was appointing Dr. El Kosheri, inviting them to indicate any objection to the above appointment. Nevertheless, none of the Respondents expressed any objection. Thus, the Respondents were not treated unequally. They forfeited their right to nominate an arbitrator, whether individually or jointly.

As regards the nomination of KBC's arbitrator, Claimant states that, under the ESC, it was not required to consult with PERTAMINA as the latter did not commence arbitration against PLN. It was only KBC that claimed against PLN. Thus, the issue of agreeing upon a « joint arbitrator » never arose.

(3) *The Arbitral Tribunal's decision*

The Arbitral Tribunal is of the view that KBC's argument, according to which the Respondents forfeited their right to nominate an arbitrator whether individually or jointly is irrelevant in the discussion. Indeed, this failure to nominate one or several arbitrators could not give the Secretary General of the ICSID the power to make an appointment in breach of

the parties' arbitration agreements. The Arbitral Tribunal does not consider either that the absence of objection by the Respondents to the appointment of Dr. El Kosheri within the period fixed by Mr. Antonio R. Parra, on behalf of the Secretary General of ICSID in his letter of June 29, 1998 to the Respondents can be analysed as an assent to the decision of appointing an arbitrator on behalf of the three Respondents. In his letter, Mr. Parra was asking whether the Respondents had any objection to the person of Dr. El Kosheri, not to the decision to appoint a second arbitrator. As stressed by the Respondents in their memorial regarding preliminary issues of January 10, 1999, (p.36), « *Respondents do not complain of the choice of the person of the arbitrator made by the ICSID Secretary General, but must complain of the structural inequality so created* ».

In reality, to decide on the Respondents' objection to its constitution, the Arbitral Tribunal must first consider whether the Secretary General of ICSID has respected the parties' arbitration agreements. In the affirmative, the Arbitral Tribunal would have to assess whether the parties have been treated equally and, if not, what is the consequence thereof. In its determination, the Arbitral Tribunal will not take into consideration the GOI's position, since it has already been decided that it could not be retained as a party in this arbitration.

It results from Article 13.2 of the JOC and from Section 8.2 (b) of the ESC that the Arbitral Tribunal must primarily be guided by the spirit of the contracts and the « *underlying intent of the parties* ». This is a basic principle of interpretation which is reflected by Article 1343 of the Indonesian Civil Code. Moreover, the Arbitral Tribunal accepts the views expressed in the ICSID Award of September 25, 1983 in the case Amco Asia Corp (US) and others vs. The Republic of Indonesia (Yearbook Commercial Arbitration, 1985, p.61):

« *In the first place, like any other convention [read : agreement], a convention to arbitrate is not to be construed restrictively, nor, as a matter of fact, broadly or liberally. It is to be construed in a way which leads to find out and to respect the common will of the parties : such a method of interpretation is but the application of the fundamental principle pacta sunt servanda, a principle common, indeed, to all systems of internal law and to international law.*

Moreover—and this is again a general principle of law—any convention, including conventions to arbitrate, should be construed in good faith, that is to say by taking into account the consequences of the commitments the parties may be considered as having reasonably and legitimately envisaged ».

No guidance to solve the problems at stake can be directly found in the arbitration clause included under article 13 of the JOC. Indeed, this clause only contemplates arbitration proceedings between two parties, i.e., KBC and PERTAMINA. On the contrary, Section 8 of the ESC contemplates the solution of disputes between KBC, PERTAMINA and PLN. In view of the integration of the two contracts, the provision of this section plays a very important role in ascertaining the intent of the parties regarding the constitution of an arbitral tribunal in a tripartite dispute.

Section 8 (2,a) of the ESC provides that « . . . .*PLN on the one hand and COMPANY* (read : KBC) *and PERTAMINA on the other hand, will each appoint one arbitrator, in each case, within thirty (30) days of the date of a request to initiate arbitration, who will then jointly appoint a third arbitrator within thirty (30) days of the date of the appointment of the second arbitrator, to act as Chairman of the Tribunal. Arbitrators not appointed within the time limits set forth in the preceding sentence shall be appointed by the Secretary General of the International Center for Settlement of Investment Disputes, upon the request of any party* ».

According to the Respondents, this provision would mean that in any dispute arising from the ESC, KBC and PERTAMINA should appoint jointly one arbitrator and PLN should appoint one arbitrator. The Arbitral Tribunal, on the basis of the above mentioned principles of interpretation, cannot accept that such has been the intent of the parties. Indeed, as the ESC arbitration clause does not apply only to disputes opposing KBC and PERTAMINA to PLN, it would defy common sense in case of a dispute between two parties only or in case of disputes opposing KBC to PERTAMINA and PLN, that KBC and PERTAMINA be obliged to appoint jointly one arbitrator. The parties may not be considered as having reasonably envisaged such a solution.

It results from this analysis that the provision of Section 8 (2) of the ESC according to which KBC and PERTAMINA should appoint jointly an arbitrator applies only to disputes opposing PLN to KBC and PERTAMINA. The consequence is that for disputes between two parties only or disputes opposing KBC to PLN and PERTAMINA or disputes opposing PERTAMINA to PLN and KBC, the parties have not expressly agreed in the ESC arbitration clause on the procedure relating to the appointment of the arbitrators. Thus, the appointment of the arbitrators must be made according to the UNCITRAL Arbitration Rules. Indeed, the first sentence of Section 8 (2) of the ESC reads:

« *if the Dispute cannot be settled within forty-five calendar (45) days by mutual discussions as contemplated by Section 8.1 hereof, the Dispute shall finally be settled by an arbitral tribunal (the « Tribunal ») under the UNCITRAL Arbitration Rules contained in Resolution 31/98 adopted by the United Nations General Assembly on December 15, 1976 and entitled Arbitration Rules of the United Nations Commission on International Trade Law as in force at the time such arbitration is commenced* ».

Pursuant to Article 5 of the UNCITRAL Arbitration Rules, the number of arbitrators must be three if the parties have not previously agreed on the number of arbitrators. Pursuant to Article 7 of the UNCITRAL Arbitration Rules, *« if three arbitrators are to be appointed, each party shall appoint one arbitrator»*. In case of disputes opposing more than two parties, it implies that two groups of parties must be constituted, each group being treated as a party for the purpose of appointing arbitrators. Such regrouping may be difficult and even impossible in the case of parties with different interests.

There is no such difficulty in this case where the parties have considered with the constitution of the Arbitral Tribunal in a specific case of tripartite arbitration, i.e. disputes opposing PLN to KBC and PERTAMINA. They have expressly admitted that a group of two parties, KBC and PERTAMINA, which have not necessarily common interests, should appoint jointly an arbitrator. It is thus implicit that they were admitting that in the case of disputes opposing one party to a differently constituted group of two parties, the same solution should apply by analogy.

On the basis of the above, the Arbitral Tribunal is satisfied that when the Secretary General of ICSID appointed an arbitrator, failing an appointment by the Respondents, he was respecting the intention of the parties. This conviction is strengthened by the fact that when the Respondents were requested to nominate an arbitrator they did not decline the invitation on the rationale that they were requested to make a joint nomination. Their argumentation was that the Notice for Arbitration was premature as KBC had neglected the amicable consultation provisions of the JOC and the ESC.

The Arbitral Tribunal does not accept that the respect of the intent of the parties by the Secretary General of ICSID, in the constitution of the Arbitral Tribunal, created an inequality of treatment among the parties. The Respondents were given the

opportunity to nominate an arbitrator and they have chosen not to do so. The consequence was not that KBC was able to exercise a « *preponderant influence* » in the decision of the Arbitral Tribunal, to use an expression referred to in the decision of the Court of Justice of Geneva of November 26, 1982 in the Westland Case. As stressed by the Geneva Court in this decision, « *the arbitrator, even if designated by one party, is not the agent nor his representative* ». This applies to the three members of the Arbitral Tribunal.

On the basis of the above, the Arbitral Tribunal decide [sic] that the Respondents' objections to its constitution must be dismissed.

IV—COSTS OF ARBITRATION

The Claimant and the Respondents have respectively requested that all costs and expenses of the proceedings relating to the preliminary issues decided in this award, including costs of legal representation and assistance, be borne by the other side.

According to Article 40 (1) of the UNICTRAL Arbitration Rules « *the costs of arbitration shall in principle be borne by the unsuccessful party* ». In that case, PERTAMINA and KBC have been unsuccessful in all the preliminary issues they have raised. On the contrary, the GOI has been successful in its objection to the jurisdiction of the Arbitral Tribunal.

As a consequence, PERTAMINA and PLN must jointly and severally bear the portion of the costs of arbitration relating to the preliminary issues they have raised and KBC must bear the portion of the costs of arbitration relating to the preliminary issue raised by the GOI.

Considering the nature and the difficulty of the problems at stake, the Arbitral Tribunal decides that the portion of the arbitration costs to be borne by PERTAMINA and PLN

amount to two third of the arbitration costs for this phase of the procedure and the portion to be borne by KBC amounts to one third.

By the same token, and pursuant to Article 40 (2) of the UNCITRAL Arbitration Rules, the Arbitral Tribunal decides that PERTAMINA and PLN will bear two third of KBC's reasonable costs of legal representation and assistance for this part of the procedure and that KBC will bear one third of the reasonable costs of legal representation and assistance which were common to the three Respondents.

The costs of arbitration for this phase of the procedure, including the arbitrators fees and expenses are fixed as follows:

Yves DERAINS :	US$ 35.500
Piero BERNARDINI:	US$ 26.300
Ahmed S. EL KOSHERI :	US$ 26.300
Total :	US$ 88.100

The expenses of the Arbitral Tribunal amounts to USA $11.900. Thus, the costs of the arbitration amounts to US $ 100.000. This amount is covered by the initial deposit made by the parties.

Thus, the portion of the costs of the arbitration to be borne by PERTAMINA and PLN amounts to US$ 66.666 and the portion to be borne by KBC amounts to US$ 33.333.

As far as the proceedings relating to the preliminary issues decided in this award are concerned, PERTAMINA, PLN and the GOI have jointly made a deposit of US$ 50.000 and KBC has made a deposit of the same amount.

Consequently, PERTAMINA and PLN are jointly and severally condemned to pay an amount of US$ 16.666 to KBC.

The amount of the costs of legal representation and assistance claimed by KBC is US$ 525.624,86. The amount of the costs of legal representation and assistance claimed by the Respondents is US$ 611.499,14.The Arbitral Tribunal consider that these amounts are reasonable.

Consequently, PERTAMINA and PLN are jointly and severally condemned to pay US$ 350.416,56 to KBC and KBC is condemned to pay US$ 203.833,04 to the GOI.

ON THE BASIS OF THE FOREGOING,
THE ARBITRAL TRIBUNAL FINDS AND
- DECIDES AS FOLLOWS:

1. The Arbitral Tribunal has no jurisdiction over the Government of Indonesia ;

2. PERTAMINA's and PLN's objections to the Arbitral Tribunal's jurisdiction for lack of respect of the amicable settlement procedure contemplated in the arbitration clauses are dismissed ;

3. KBC was entitled to file its claims, based on the JOC and the ESC, in a single arbitration procedure and PERTAMINA's and PLN's objection in this respect are dismissed ;

4. The Arbitral Tribunal was properly constituted and PERTAMINA's and PLN's objections in this respect are dismissed ;

5. PERTAMINA and PLN are jointly and severally condemned to pay US$ 16.666 and US$ 350.416,56 to KBC ;

6. KBC is condemned to pay US$ 203.833,04 to the Government of Indonesia ;

7. All issues not resolved in this Preliminary Award are reserved.

Made in Geneva, on September 30, 1999

/s/ Prof. Piero Bernardini
PROF. PIERO BERNARDINI

/s/ Prof. Ahmed S. El Kosheri
PROF. AHMED S. EL KOSHERI

/s/ Me Yves Derains
ME YVES DERAINS

APPENDIX I

FINAL AWARD
IN AN ARBITRATION PROCEDURE
UNDER THE UNCITRAL ARBITRATION RULES

BETWEEN:

KARAHA BODAS COMPANY L.L.C., a company organized and existing under the laws of the Cayman Islands with its Registered office at Plaza Aminta Suite 901, Jl.T.B. Simatupang, Kav, 10, Jakarta 12310, Indonesia,

hereinafter referred to as « KBC »,
Claimant,

represented by Mr. Jonathan D. SCHILLER, BOIES & SCHILLER, 5301 Wisconsin Avenue, NW, Suite 570, Washington DC 20015, USA.

AND:

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA, a company organized and existing under the laws of Indonesia, with its Registered office at Jl. Kramat Raya n.59, 4th Floor, Jakarta 10450, Indonesia,

hereinafter referred to as « PERTAMINA »,
Respondent n°1,

PT. PLN (PERSERO), a company organized and existing under the laws of Indonesia, with its Registered office at Jl. Trunojoyo n.135, Kebayoran Baru, Jakarta Selatan 12160, Indonesia,

hereinafter referred to as «PLN »,
Respondent n°2,

Respondent n°1 and 2 being collectively referred to as the « Respondents » and represented by ADNAN BUYUNG NASUTION & PARTNERS, Wisma Danamon Aetna Life, 18th floor, Jl. Jend. Sudirman Kav. 45-46, Jakarta 12930,

Indonesia and by Mr. Edwin B. MISHKIN, CLEARLY [sic] GOTTLIEB STEEN & HAMILTON, One Liberty Plaza, New York, NY 1006-1470, USA.

I–RELEVANT FACTS

(A) The parties

1. KBC is a Cayman Islands limited life company which was granted contractual rights to develop the 400 MW Karaha Bodas Geothermal Project (hereinafter the « Karaha Project » or "the Project"), in West Java, Indonesia. The Project includes primarily two zones: the Karaha zone and the Telaga Bodas zone. KBC was to develop the Project, generate and sell electricity to PLN on behalf of PERTAMINA.

PERTAMINA is an oil and gas eorporation, established by Law n.8 on 1971 and owned by the Government of the Republic of Indonesia. PERTAMINA is entrusted with, inter alia, the exploration and exploitation of geothermal resources and generation of electricity in Indonesia.

PLN is a state-owned corporation presently subject to Government Regulation n.12/1998 and is the electric utility which undertakes the supply of electricity to the public in Indonesia.

(B) The agreements

2. On November 28, 1994, two contracts (hereinafter "the Contracts") were entered into as part of the Karaha Project.

(1) The Joint Operation Contract

3. This contract ("the JOC") establishes that PERTAMINA is responsible for the management of the geothermal operations of the Project and that KBC will serve as the Contractor. As such, KBC was required to develop geothermal energy in the project area and to build, own and operate generating facilities.

(2) *The Energy Sales Contract*

4. By this contract, ("ESC"), PLN agreed to purchase from PERTAMINA the electricity produced by and delivered from or made available by the generating facilities constructed by KBC. As the Contractor to PERTAMINA pursuant to the JOC, KBC was entitled under the ESC to deliver and to sell to PLN, on behalf of PERTAMINA, up to 400 MW of electricity from the Karaha Project.

(C) Initial development of the Project

5. As illustrated by the minutes of several Joint Committee Meetings, with the participation of KBC, PERTAMINA and PLN as well as in Work Plans and Budgets regularly presented by KBC to PERTAMINA in 1995, 1996 and 1997, KBC embarked into and partly completed during this period a program of exploration and drilling. At the Joint Committee Meeting of August 12, 1997, it was decided that KBC should submit a Notice of Resource Confirmation (NORC) of 55 MW at Karaha on or about September 15, 1997, and for 55 MW for Telaga Bodas on November 1st, 1997. A Notice of Intent to Develop (NOID) for 110 KWe at both sites was to be submitted by KBC on December 20, 1997. A first NORC for 60 MW at Karaha was submitted by KBC to PERTAMINA on September 18, 1997.

(D) Suspension of the Project

(i) *The September 20, 1997 Presidential Decree*

6. On September 20, 1997, a Presidential Decree was issued under n.39/1997. This Decree emphasized that « *in order to safeguard economic continuity and the general progress of the national economy, it is deemed necessary to take steps to deal with the monetary fluctuation and the consequences arising therefrom* ». It further stressed, « *in the framework of dealing with this problem, it is necessary to postpone/review a number of Government projects, State-Owned enterprises*

projects and private projects related to the Government or the State-Owned Enterprises ».

According to Article 5 of this Presidential Decree, a group of 75 government related infrastructure projects, including the Karaha Project, was subject to postponement.

7. However, at that time the parties did not consider that the suspension of the Karaha Project would last very long. Indeed, at the Joint Committee Meeting of October 14, 1997, PERTAMINA and PLN expressed confidence that the status of the Project would be restored and it was stressed that KBC should continue the Project.

(ii) *The November 1st, 1997 Presidential Decree*

8. Such an optimistic forecast proved to be correct since, on November 1st, 1997, a new Presidential Decree n.47/1997 was issued which ordered that several of the postponed projects had to be resumed, including the Karaha Project.

9. In this context, KBC continued its activities of exploration and development. On December 16, 1997, a new NORC was submitted by KBC to PERTAMINA, which indicated a probable resource capacity for both areas of Karaha and Telaga Bodas of 210 MW with a probable estimated reserve for Karaha of 240 MW. The conclusion was that there was a reasonable expectation of 210 MW of geothermal resources available to be developed at the Karaha area. Thus, KBC gave notice of its intention to develop a 210 MW output capacity power station in the Karaha geothermal area.

(iii) *The January 10, 1998 Presidential Decree*

10. On January 10, 1998, a third Presidential Decree was issued, under n°5/1998. It revoked Decree n.47/1997 and confirmed the postponement of the Karaha Project.

(E) Significant events further to the suspension of the project

11. It is common ground among the parties that, in January 1998, KBC and PERTAMINA decided to join efforts in order to convince the Government of Indonesia to exempt the Project from Decree n.5/1998. On PERTAMINA's request, KBC sent it a letter dated January 23, 1998 stating arguments supporting the decision to exempt the Project. As a follow up, PERTAMINA wrote to the Chairman of the Agency of the Development Planning on February 11, 1998, asking reconsideration from the Government for the sake of continuing the Project "*within the foreseeable future*". In the meantime, on February 10, 1998, KBC had given notice to PERTAMINA and PLN that the issuance of the Presidential Decrees n.5/1998 and 39/1997 constituted an event of Force Majeure under both the JOC and the ESC. KBC was suggesting a meeting with representatives of PERTAMINA and PLN to take place as soon as possible and was reserving its right to assert claims. However, no tripartite meeting ever took place.

12. On March 5, 1998, KBC sent PERTAMINA a revised Working Program and Budget for 1998, taking into account the suspension of the Project and based on the assumption that the works would resume in the fourth quarter of the year.

13. Then, on March 6, 1998, PLN wrote as follows to PERTAMINA and KBC:

> "*Pursuant to the above Presidential Decrees* [n.39/1997 and n.5/1998], *Karaha Geothermal Project is categorized as project to be postponed. therefore PERTAMINA and Company as the contracting parties under the Energy Sales Contract, shall abide by those Presidential Decrees. As a consequence thereof, any activities initiated or undertaken by you which is not contemplated under such Presidential Decrees in*

relation with Karaha geothermal Project should be solely be at your own risks and liabilities"

14. On March 11, 1998, PERTAMINA approved KBC 1998 Working Program and Budget as revised and required that any other adjustment which might be necessary in relation to Presidential Decree n.5/1998 be made.

15. On April 30, 1998, KBC served its Notice for Arbitration.

II–THE PROCEDURE

16. KBC's Notice for Arbitration was served not only on PERTAMINA and PLN but also on the Government of Indonesia. Several preliminary objections were raised by the three Respondents at an early stage of the procedure. By a Preliminary Award of September 30, 1999, the Arbitral Tribunal ruled on all preliminary objections and made the following decisions:

"1. *The Arbitral Tribunal has no jurisdiction over the Government of Indonesia;*

2. PERTAMINA's and PLN's objections to the Arbitral Tribunal's jurisdiction for lack of respect of the amicable settlement procedure contemplated in the arbitration clauses are dismissed;

3. KBC was entitled to file its claims, based on the JOC and the ESC, in a single arbitration procedure and PERTAMINA's and PLN's objection in this respect are dismissed;

4. The Arbitral Tribunal was properly constituted and PERTAMINA's and PLN's objections in this respect are dismissed;

5. PERTAMINA and PLN are jointly and severally condemned to pay US$ 16.666 and US$ 350.416,56 to KBC;

6. KBC is condemned to pay US$ 203.833,04 to the Government of Indonesia;

7. All issues not resolved in this Preliminary Award are reserved."

The description of the procedure which led to these decisions appears in the Preliminary Award and is deemed to be integrated by reference as an integral part of this Final Award.

17. By virtue of Procedural Order n°1, dated November 19, 1998, the Arbitral Tribunal had provisionally indicated that, in case it would retain its jurisdiction, the time table for the continuation of the procedure would be as follows:

"The Claimant may, within one month from the rendering of the preliminary award, revise its Statement of Claim dated November 11, 1998;

The Defendants will the have two months to reply starting either from the receipt of the revised brief or from the notification by the Claimant that no revised brief will be filed;

The Claimant will submit a rebuttal to the reply of the Defendants within one month from receipt of that reply;

The Defendants will then submit a rejoinder to the Claimant's memorial within one month from receipt of that rebuttal".

18. By a letter dated October 18, 1999, addressed to the Respondents, the Claimant requested an extension of time until November 24, 1999 to submit its Revised Statement of Claim. Then, by its letter dated October 27, 1999, the Claimant submitted directly this request to the Arbitral Tribunal and further proposed the following timetable:

"Respondents' Reply to be filed by January 24, 2000;

The Claimant's Rebuttal to The Respondents' Reply (if any) to be filed by February 24, 2000;

The Respondents' Rejoinder to The Claimant's Rebuttal (if any) to be filed by March 24, 2000;

A merits hearing in late April or May 2000".

By letter of October 28, 1999, the Arbitral Tribunal indicated to the parties that, failing any comments from the Respondents to the Claimant's fax of October 18, 1999, the Arbitral Tribunal would extend the time limit allowed to the Claimant to revise its Statement of Claim until November 24, 1999. Furthermore, the Arbitral Tribunal requested the Respondents' comments on the Claimant's proposed schedule.

By letter dated November 3rd, 1999, the Respondents agreed on the extension of the time limit requested by the Claimant and, by letter dated November 9, 1999, they agreed to the proposed schedule.

19. On November 16, 1999, the Arbitral Tribunal made the following decisions in Procedural Order n°2:

"*—The Claimant will submit its revised Statement of Claim* ***by November 24, 1999 at 6.00 pm Paris time;***

—The Respondents will submit their Reply ***by January 24, 2000, at 6.00 pm Paris time;***

—The Claimant will submit its Rebuttal to the Respondents' Reply ***by February 24, 2000, at 6.00 pm Paris time;***

—The Respondents will submit their Rejoinder to the Claimant's Rebuttal ***by March 24, 2000, at 6.00 pm Paris time.***

Then, a hearing on the merits will take place, the date of which will be fixed in due course."

20. By letter dated November 16, 1999, in order to fix the dates for a hearing on the merits, the Arbitral Tribunal had asked the parties to indicate the number of witnesses they

intended to present and to confirm their agreement that the hearing be held in Paris.

By letter dated November 18, 1999, Counsel for the Claimant informed the Arbitral Tribunal of his agreement on the place of the hearing and that he intended to call four witnesses.

By letter dated November 19, 1999, the Arbitral Tribunal requested the Respondents' comments and their availability for a hearing from May 8 to May 19, 2000.

21. On November 24, 1999, the Claimant submitted its revised Statement of Claim, together with exhibits and witness statements.

22. By letter dated November 24, 1999, Counsel for the Respondents requested to be allowed to provide his reply by December 1st, 1999. Such extension was granted by the Arbitral Tribunal on the same day.

By letter dated December 1st, 1999, Counsel for the Respondents informed the Arbitral Tribunal of the number of witnesses they intended to present and asked an additional ten days to submit a response regarding the dates of the hearing.

By letter dated December 9, 1999, Counsel for the Respondents informed the Arbitral Tribunal that they would not be in a position to file their Reply before January 24, 2000 and that they might request additional time. Moreover, the Respondents were not able to give an answer regarding the hearing dates and thus asked for an additional ten days to answer.

By letter dated December 13, 1999, Counsel for the Claimant objected to the Respondents requested additional time.

By letter dated January 7, 2000, the Arbitral Tribunal required the Respondents to indicate their final position by January 12, 2000.

On January 10, 2000, Counsel for the Respondents wrote to the Arbitral Tribunal that, due to Indonesian Holidays, they were not in a position to answer.

On January 14, 2000, Counsel for the Respondents informed the Arbitral Tribunal that they were requesting an extension of time for filing their Reply until Mach [sic] 24, 2000 and that, due to changes in the direction of PLN, they proposed a new time table.

By letter dated January 14, 2000, the Arbitral Tribunal asked the Claimant's comments by January 18, 2000.

On January 18, 2000, Counsel for the Claimant wrote to the Arbitral Tribunal objecting to the Respondents' requested extension and delay and stressing that "*to the extent that the Tribunal favorably reviews The Respondents' late request for an extension, The Claimant requests that a firm hearing date be established so that the hearing will be completed before summer holidays, and there may be a reasonable expectation of the Tribunal's award by the fourth quarter of this year*".

23. In Procedural Order n. 3, dated January 12, 2000, the Arbitral Tribunal ruled:

> "*—The Respondents will file their* ***Reply by March 24, 2000;***
>
> *—The Claimant will file its Rebuttal, if any,* ***by April 24, 2000;***
>
> *—The Respondents will file their Rejoinder, if any,* ***by May 24, 2000.***
>
> *A hearing on the merits will be held in Paris* ***from June 19 until June 30, 2000 included.***
>
> *The Arbitral Tribunal stresses that, unless good cause is shown, this schedule will not be modified and no extension of time will be granted to either party*".

24. By letter dated March 6, 2000, the law firm Clearly [sic] Gottlieb Steen & Hamilton informed the Arbitral Tribunal and the Claimant that it had been retained by the Respondents to represent them in this arbitration together with Adnan Buyung Nasution & Partners.

25. By agreement of the parties, confirmed by Procedural Order n°4, of March 14, 2000, the procedural timetable was amended as follows:

> *"—The Respondents will file their Reply* ***by April 7, 2000;*** *The Respondents' exhibits, witness designations and reports (including expert's reports), to the extent not included in the reply, will be filed* ***by April 14, 2000;***
>
> *—The Claimant will file its Rebuttal, if any, (including any exhibits, witness designations and reports)* ***by May 8, 2000;***
>
> *—The Respondents will file their Rejoinder, if any, (including any exhibits, witness designations and reports)* ***by June 9, 2000.***
>
> *The hearing on the merits is maintained and will be held from* ***June 19 until June 30, 2000 included."***

26. On April 7, 2000, the Respondents filed their Reply together with exhibits and witnesses statements [sic].

27. The Claimant filed its Rebuttal on May 8, 2000.

28. On May 31st, 2000, the Arbitral Tribunal issued Procedural Order n°5 worded as follows:

"The Arbitral Tribunal has duly considered the communications of the parties regarding the organization of the hearing to be held in Paris, from June 19, 2000 until June 30th, 2000;

The parties [sic] generally in agreement and only a limited number of issues were to be decided by the Arbitral Tribunal;

ON THE BASIS OF THE ABOVE,
THE ARBITRAL TRIBUNAL GIVES THE
FOLLOWING DIRECTIONS,

1–The hearing dedicated to the witnesses and experts (including legal experts) evidence to be held from June 19, 2000 until June 30th, 2000 in the Mercure Hotel in Paris:

The Arbitral Tribunal intends to convene each day at 9:30 am and break for lunch at 1:00 pm.

The afternoon sessions are scheduled from 2:00 to 6:00 pm.

A break of thirty minutes will be provided in the morning and in the afternoon.

2–The hearing will consist of 10 days of 6:30 working hours each. This amounts to 65 hours, allocated as follows:

27 hours to each side, for opening statement, cross examination and re-direct examination of the witnesses and experts. Each side will be free to use this time in the manner it deems appropriate.

11 hours to the Arbitral Tribunal (questions to the witnesses, internal meetings or time to be allocated by the Arbitral Tribunal to meet whatever circumstances may arise).

3–Direct testimony has been submitted in writing pursuant to the Tribunal's instructions. Consequently, no direct examination of the witnesses will be admitted, unless expressly authorized by the Arbitral Tribunal for good cause shown. Oral testimony shall consist mainly of cross-examination and re-direct examination shall be limited to the subject matters of the cross-examination.

4–Witnesses and experts presented by the Claimant will be heard first and then witnesses and experts from the Respondents.

5–The Arbitral Tribunal reserves the right to put questions to witnesses and/or experts and organize confrontations between witnesses and/or experts.

6–As English is the language of the proceedings, if a witness and/or an expert is not able to give evidence in this language, the party which is relying on the evidence of that person has to provide simultaneous interpretation into English.

7–The Arbitral Tribunal has retained the services of a Court reporter to record the hearing.

8–The list of the witnesses and experts each party wants to present or to cross examine, will be submitted ***by June 9, 2000 before 6.00 pm Paris time.*** *If the Respondents provide additional witnesses and/or expert's statements with their Rejoinder due on June 9, 2000, The Claimant shall have until* ***June 12, 2000, before 6.00 pm Paris time*** *to submit a revised list including new witnesses and/or experts. The parties would schedule the order of witnesses after the exchange of witness lists.*

Each side must submit an outline of its opening statement to the Arbitral Tribunal and to the other side ***by June 14, 2000 before 6.00 pm Paris time.***

The persons that will be heard during the hearing have to be those who have already submitted a witness statement or an expert report for the Claimant or for the Respondents.

In case a witness whose presence at the hearing was requested does not shown [sic] up, his or her written statement shall be disregarded. This rule will not apply to expert's reports.

9–The fact that an opinion or assertion of fact in a witness statement has not been cross-examined will not be taken as an admission of agreement with that portion of the witness statement.

10–The Tribunal shall treat the materials submitted by each side pursuant to the Tribunal's Procedural Orders, and the oral testimony at the hearing and any opening statements, as the materials which accurately record the submissions which each side wishes to make.

11–No oral closing statement is expected. Instead the parties will be authorized to file a post-hearing memorial."

29. The Respondents filed their Rejoinder on June 9, 2000.

30. The hearing started on June 19, 2000 and was closed on June 23rd, 2000 with the parties' agreement. A transcript was established by Yvonne Vanvi, Congrés 2000. The following witnesses and experts were heard:

Presented by the Claimant

Mr. Christopher McCallin
Mr. Leslie Gelber
Mr. Robert McGrath
Ms Barbara Bishop Gollan

Presented by the Respondents

Mr. John Norris
Ms Assistia Semiawan
Mr. Syafi Sulaiman

31. During the hearing,

–The parties declared that they waived their respective requests for discovery;

–The Respondents waived their objection to the admissibility of the Himpurna/Patuha Awards, although they have maintained that they should not have been submitted and stressed that they should not be treated as precedents;

–The Claimant accepted that these Awards should not be given more value than any other arbitral Awards but stressed that they should not be given less value.

This was reflected in Procedural Order n°6 of June 28, 2000.

In reply to a question of the Chairman of the Arbitral Tribunal, the parties confirmed that they had no objection as to the conduct of the proceedings (see transcript of June 23rd, 2000, lines 14 to 25).

32. In Procedural Order n°6, the Arbitral Tribunal decided that:

> *"1–The parties will submit simultaneously a post hearing memorial three weeks after having received the transcript of the hearing; no new evidence should be submitted with this post hearing brief;*
>
> *2–The party's respective requests for discovery are withdrawn;*
>
> *3–The Himpurna/Patuha Awards are admitted in this arbitration and will be given the same value as any other supporting academic materials."*

33. The Claimant's and the Respondents' Post-Hearing Memorials were submitted on August 27, 2000.

34. On August 10, 2000, the Respondents sent a letter to the Arbitral Tribunal pointing out what they describe as two inaccurate assertions in the Claimant's Post-Hearing Memorial.

By a fax of the same day, the Claimant requested that the Respondent's letter of August 10, 2000 and any further argument on the merit be disregarded.

In their August 7, 2000 Post-Hearing Memorials, the Claimant and the Respondents requested to be authorized to submit the costs that they have incurred in this arbitration proceedings.

35. The Arbitral Tribunal made the following decision in Procedural Order n°7, dated August 31st, 2000:

> *"1–Since the August 10, 2000 letter of the Respondents was not contemplated by Procedural Order n°6 and since the Arbitral Tribunal will in any case check the accuracy of any assertion of the parties relevant to its decision, this letter will not be taken into consideration by the Arbitral Tribunal.*
>
> *2–The proceedings are closed and no further argumentation or submission of evidence will be accepted, unless specifically authorized or requested by the Arbitral Tribunal.*
>
> *3–The parties are invited to submit, by* ***September 15, 2000, 6.00 PM Paris time,*** *a Statement of the respective costs that they have incurred in these proceedings, including all reasonable costs, expenses and attorney's fees."*

36. The parties submitted their respective costs on September 15, 2000. The Claimant is requesting in this respect an amount of US$ 2,510,658, plus an amount of US$ 365,244.35, allegedly representing the amount of US$ 350,415.56 awarded to them in the Preliminary Award, increased by interest at the rate of 4,53% per annum. The amount claimed by the Respondents is US$ 2,823,621.18.

III—DISCUSSION

37. In its revised Statement of Claims of November 24, 1999, KBC requests the following remedies:

> 1–Remedies for breach of contract
>
> a) damages, including,
>
> –payment of its expenditures amounting to US$ 96 million;

–compensation for loss of profits, amounting to US$ 512.5 million;

–as an alternative to the compensation for loss of profits, the amount of deemed dispatch payments for US$ 437 million.

b) alternatively, termination and damages

c) alternatively, specific performance

2–Damages for unjust enrichment

3–Interest on KBC's loss, amounting to US$ 58.6 million on November 24, 1999 if KBC is awarded US$ 608.5 million (US$ 96 million + US$ 512.5 million) or alternatively, US$ 51.3 million, if the Arbitral Tribunal would determine that KBC is only entitled to US$ 532.9 million (US$ 96 million + US$ 437 million).

38. In its Post Hearing Memorial, the Claimant has clarified that its request for termination of the Contracts was not an alternative to its request for damages and that it was requesting termination as well as damages (see n°211). It has reduced the amount of its damages for its expenditures to US$ 94.6 million. It has also requested that the Respondents pay the costs of the arbitration.

39. In all their submissions, the Respondents have requested that KBC's claims be denied and that KBC be condemned to pay all the costs and expenses of the arbitration.

40. As a result of the parties' respective memorials, and in the light of the documentary materials, testimony of the witnesses and expert evidence submitted, the issues to be decided upon by the Arbitral Tribunal can be summarized as follows:

–are the Respondents in breach of their obligations under the ESC and/or the JOC?

–In the affirmative, should the ESC and/or the JOC be terminated or is KBC entitled to specific performance?

–is KBC entitled to damages?

–is KBC entitled to compensation for unjust enrichment?

–how the costs of the arbitration should be allocated among the parties?

(A) Are the Respondents in breach of their obligations under the ESC and/or the JOC

1. The Claimant's position

41. KBC contends that the Respondents have breached several of their obligations under the ESC and the JOC by, inter alia, preventing KBC from completing the units up to a total generating capacity of 400 MW and making clear that PLN would not buy and PERTAMINA would not sell the electricity generated by KBC. In particular, KBC stresses that the Respondents had agreed in the ESC and the JOC to assume the risk of Governmental action and that, consequently, the Presidential Decrees n.30/1997 and n.5/1998 were not an excuse for non-performance.

KBC draws this conclusion from Section 9.2 (e) of the ESC and Article 15.2 (e) of the JOC according to which a Governmental Related Event is an Event of Force Majeure with respect to KBC only. Consequently, the Respondents had the continuing duty to assure KBC that they would perform their obligations and not to repudiate these obligations.

42. In KBC's point of view, the fact that the Respondents, in particular PERTAMINA, may have made efforts to reverse the Presidential Decrees is irrelevant: PLN and PERTAMINA had the obligation to obtain that the Decrees be reversed, failing which they faced the risk of loss. KBC explains that the close relationship between the Respondents and the Government of Indonesia were a sufficient justification for such an allocation of risk.

43. KBC adds that by various acts and efforts to evade and repudiate their contracts, the Respondents have breached their duty to perform their contractual obligations in good faith, as required by Article 1338 (3) of the Indonesian Civil Code. KBC characterizes the Respondents' behavior as an anticipatory repudiation of their obligations which amounts to a breach of their duty of good faith.

44. KBC further contends that PLN and PERTAMINA have breached their duty "*to do all such further acts and things, as shall be necessary or convenient to carry out the provision of the [ESC]*". KBC refers to Article 21.1 of the JOC, and to Section 15.1 of the ESC (the "further assurances" claims) as well as to several other contractual provisions which, as a result of its decision to abide by to the Presidential Decrees, were not fulfilled.

45. KBC also alleges that the restructuring and reorganization of PLN, pursuant to the Presidential Decree n.139/1998 amounts to an Event of Default under Section 11.2 (e) of *the* ESC. Equally, KBC contends that PLN has breached its obligations under Section 9 (3) of the ESC to make deemed dispatch payments in case KBC is unable to generate electricity as a result of an Event of Force Majeure.

2. The Respondents' position

46. The core of the Respondents' position is that KBC seeks improperly to hold them liable for actions of the Government of Indonesia, despite of the Arbitral Tribunal decision in the Preliminary Award of September 30, 1999 that the Government acts were not breaches of contract by PERTAMINA or PLN. They characterize as artificial KBC's attempts to distinguish between the Government's decisions and the Respondents' obligations to abide by the Presidential Decrees.

They stress that none of them was responsible for the adoption of the Decrees.

47. On the contrary, the Respondents rely on their good faith attempts to persuade the Government to exempt the Karaha Project from the n.5/1998 Decree. These efforts were coordinated by PERTAMINA since the project was still in the development stage and no electricity generating plant triggering any payment obligation by PLN had been built. They stress that such efforts by PERTAMINA continued even after KBC ceased its performance of the Contracts, as illustrated by its letter sent to the Government on June 11, 1998. They also tried to reverse the Government's decision, as it had done, with success, in order to obtain that the Project be exempted from the n.39/1997 Decree. The fact that the Respondents' efforts have proved unsuccessful with respect to the n.5/1998 Decree demonstrates that KBC's claim is not based on the Respondents' conduct but on the Presidential Decree itself.

48. By relying on the Presidential Decree for its claim that the Respondents breached the contracts, KBC seeks to induce the Arbitral Tribunal to reverse a previous ruling made in its Preliminary Award. Such an approach is in conflict with the procedure defined by the Arbitral Tribunal itself which, in its Preliminary Award, limited the issues to be decided in the present phase to those *"not resolved"* in that Award.

According to the Respondents, in its Preliminary Award, the Arbitral Tribunal correctly ruled that acts of Force Majeure by the Government are not breaches of the JOC or the ESC by the Respondents as stated on page 19: *"a governmental decision which prevents KBC to perform its obligations is not deemed to be a breach of contract by PERTAMINA and PLN but a Force Majeure event excusing KBC's non performance"*. For the Respondents, such ruling is incompatible with KBC's reasoning.

49. The Respondents also allege that the contractual obligations of PERTAMINA and PLN to assist KBC in obtaining actions from the Government of Indonesia, pointed out in the

Preliminary Award (page 19) are further evidence that the Respondents have no contractual liability for the consequences of adverse Government's actions: otherwise, their obligations would not be to provide assistance but to deliver what was asked for from the Government.

Moreover, the Respondents stress that Government Related Events, listed under Section 9.2 of the ESC as Events of Force Majeure, do not appear in the list of PLN's events of default provided under Section 11.2. This is because the parties had no intention to consider a Governmental Related Event as a default by the Respondents. Termination and damages are not within the remedies contemplated by the contract in case of Force Majeure.

50. The Respondents deny having breached their obligations to provide KBC with assurance of performance. They underscore that KBC made no request to The Respondents in this respect. Instead, KBC unilaterally decided to cease performance of the contract within a month after the January 10, 1998 Decree was adopted. The situation is distinguishable from the Himpurna/Patuha awards, on which KBC relies, since in these cases the contractors had explicitly and repeatedly requested assurance of performance from PLN. Moreover, the Himpurna/Patuha's liability findings are based on the central premise that PLN is merely an instrumentality of the Government of Indonesia, a notion rejected by the Arbitral Tribunal in its Preliminary Award.

51. Contrary to KBC's allegations, the Respondents have not otherwise breached or repudiated the contracts. In particular, PLN's letter of March 6, 1998 to KBC and PERTAMINA, in which it stated that all parties had to abide by the Presidential Decree or otherwise would act at their own risk, simply advised that KBC could go forward with the project but, because the postponement was indefinite in duration, it was unclear what the consequences of doing so would be. This is not a repudiation of contract. Moreover, the March 6, 1998

letter cannot be relied upon by KBC as a basis for any claim of breach of contract by PLN since by its letter of February 10, 1998, KBC has already announced that it has ceased its own performance. Similarly, other actions referred to by KBC as breaches took place after KBC had ceased its performance and even after the start of the arbitration. To the contrary, the approval by PERTAMINA on March 11, 1998 of KBC's 1998 Work Program and Budget demonstrates PERTAMINA's hopes that the project would resume.

Finally, in its letter dated April 30, 1998, which according to Mr. Sulaiman, one of the Respondents' witnesses, was actually created on June 25, 1998, and then again on December 4, 1998, KBC confirmed that it had no conflict with PERTAMINA *"to date or in the past"*.

52. The Respondents equally stress that, in any case, KBC failed to prove that it was ready, willing and able to perform the Project Agreements, since it did not have and could not obtain the required financing and had not shown that it could have built a 210 MW plant. Thus, it cannot claim damages for breach and in no case it could have been entitled to deemed dispatch payments.

3. The Arbitral Tribunal's Decision

53. It is a fact that with the Presidential Decree n.5/1998 of January 10, 1998, the parties were not able to perform their main obligations under the contracts and that they actually ceased to perform them. Such impossibility to perform has been pointed by KBC in its letter of February 10, 1998 to PERTAMINA and PLN, where it gave notice that the Presidential Decrees n.5/1998 and n.39/1997 were events of Force Majeure under the ESC and the JOC. Quite logically, KBC added: ". . . . . *the above described events of force majeure have the effect of suspending the terms of the ESC and the JOC as well as all other applicable periods under such agreements, in each case to the extent provided therein*".

PLN's letter of March 6, 1998 to PERTAMINA and KBC expressed a similar view as to the consequences of the Presidential Decrees on the parties' obligations by stating that: "*Pursuant to the above Presidential Decrees [n.39/1997 and n.5/1998], Karaha Geothermal Project is categorized as project to be postponed, therefore PERTAMINA and Company as the contracting parties under the Energy Sales Contract, shall abide by those Presidential Decrees. As a consequence thereof, any activities initiated or undertaken by you which is not contemplated under such Presidential Decrees in relation with Karaha Geothermal Project shall solely be at your* own *risks and liabilities.*"

PERTAMINA never challenged that assessment of the situation. On the contrary, on March 11, 1998, it approved KBC's adjustments to the 1998 Working Program and Budget in relation to Presidential Decree n.5/1998 and required it to make any further adjustments which may be necessary.

There is no doubt that for all parties concerned the postponement of the Project was a decision which had to be respected.

54. However, the legal consequences of this factual situation were not the same for KBC on the one hand and for PERTAMINA and PLN on the other hand.

It is common ground among the parties that the decision by the Presidential Decree to postpone the Karaha Project is a "*Government Related Event*", as defined both in the JOC and the ESC. The JOC (Article 15.2 (e)) reads: "*.....Events of Force Majeure shall include, but not limited to :.....(e) with respect to Contractor only, any Government Related Event*".

The same text appears in Section 9.2 (e) of the ESC, the word "*Contractor*" being replaced by "*Company*", both words referring to KBC.

Thus, it results from the two contracts that the Presidential Decrees were Force Majeure Events for KBC, but not for PERTAMINA and PLN. The legal consequence is that, while KBC was entitled to invoke the Presidential Decrees as a legitimate excuse not to perform its obligations, PERTAMINA and PLN were not entitled to do so as far as the performance of their own obligations was concerned. To assert the contrary, as the Respondents do, is just an attempt to deprive of any significant meaning the provisions of Article 15.2 (e) of the JOC and Section 9.2 (e) of the ESC which clearly indicate that a Government Related Event is not a Force Majeure Event with respect to PERTAMINA and PLN.

55. Since PERTAMINA and PLN were not in a position to rely on the Presidential Decrees as a valid excuse not to perform their obligation, under the ESC and the JOC, the non-performance of such obligations is a breach of contract for which they are liable, unless they can show another exonerating circumstance. They have not, and, in this respect, the Respondent's allegations that KBC failed to prove its readiness, willingness and ability to perform the Project are immaterial.

56. The above stated conclusion is not in contradiction with the finding of the Arbitral Tribunal, in its Preliminary Award of September 30, 1999, according to which "*a governmental decision which prevents KBC to perform its obligations is not deemed to be a breach of contract by PERTAMINA and PLN but a Force Majeure Event excusing KBC's non performance*". This finding aimed at stressing that the Government was not a party to the Contracts and it was not meant to express any view as to the consequences for PERTAMINA and PLN of a Governmental decision which prevents the performance of the Contracts. Contrary to the Respondents' point of view, the fact that they are not responsible for the Governmental decision to prevent the performance of the

Contracts does not exempt them from liability if they do not perform their own obligations in abiding by the decision. The Governmental decisions, in this case the Presidential Decrees n.39/1997 and n.5/1988, do not amount to a breach of PERTAMINA's and PLN's obligations. However, since a Governmental event is not a Force Majeure event for them, their non-performance has no legitimate excuse and must be considered as a breach of contract.

57. Such distinction is far from being artificial, as the Respondents contend. It applies each time a party is actually prevented from performing its contractual obligations by an event which it cannot invoke as Force Majeure due to the existence of provisions to that effect in the contract or by application of the law. Many examples may be provided. For instance, depending on the provisions of a contract, a strike may or may not be a Force Majeure event. If it is not, and although a party is actually prevented by the strike to perform its obligations, non-performance will amount to a breach of contract. Likewise, the failure of a subcontractor may or may not be characterized as a Force Majeure Event: in the negative, it is not a legitimate excuse for non-performance although the defaulting party played no role in its subcontractor's default. Even more significant, is the case of the seller which, according to some trade terms (e.g. CIF) has no legitimate excuse if it does not deliver the goods because an export license has been cancelled: although the cancellation is the result of a governmental decision for which the seller is not responsible, it is in breach of contract for non performance of its obligations of delivery. As rightly pointed out by the Claimant, the provisions of Article 15.2 (e) of the JOC and Section 9.2 (e) of the ESC express an allocation of risk, by putting the consequences of a Governmental decision which prevents the performance of the contract at PERTAMINA's and PLN's sole risk.

58. The Respondents refused to bear the risk that they had contractually assumed. PLN's letter of March 6, 1998 to KBC and PERTAMINA is very illustrative in this respect. The Arbitral Tribunal cannot follow the Respondents when they suggest (Post Hearing Memorial, p.24) that in this letter, PLN advised KBC that "*it could go forward with the project but, because the postponement was indefinite in duration, it was unclear what the consequences of doing so would be*". Very clearly the letter was stating that "*PLN, PERTAMINA and Company (KBC) shall abide by "the Presidential Decrees*" and was warning PERTAMINA and KBC against the consequences of not doing so by emphazing that: "*any activities initiated or undertaken by you which is not contemplated under such Presidential Decrees in relation with Karaha Geothermal Project shall solely be at your own risks and liabilities*".

Contrary to the Respondents' suggestion, this was not an advise [sic] to KBC that it could go forward with the Project. It was an advise [sic] not to do so, with the precision that if such advise [sic] was not followed by KBC and/or PERTAMINA, they would be acting at their own risk. As a matter of fact, PLN was simply seeking to shift over KBC the risk attached to the Governmental Events, a risk that lied over PERTAMINA and PLN pursuant to the Contracts.

In this context, the fact that, with its Notice of Arbitration of April 30, 1998, KBC pointed out its absence of conflict with PERTAMINA has no relevance, even if it was reconfirmed in June 1998 and as late as December 1998. Indeed, this appears merely as an attempt to maintain good relations with PERTAMINA in the hope that a solution may be found to the existing problems and not as recognition of PERTAMINA's efforts in order to have the Project resumed. As a matter of fact, in December 1998, the Arbitral Tribunal was already constituted to settle what for the Claimant was an existing dispute.

59. On the part of PLN, its letter of March 6, 1998 was a clear expression of its determination not to perform its contractual obligations for an indefinite period, with the additional warning that performance by either KBC and PERTAMINA would not be treated as being under the Contracts. Since, as explained above, the ESC did not allow PLN to rely on the Presidential Decrees as a legitimate excuse not to perform its obligations, it was a declaration of intent to breach and an incitation to PERTAMINA to commit the same breach.

PERTAMINA's absence of objection to PLN's firm statement and then its positive compliance with PLN's instructions can only be construed as sharing the same position, which amounts to a breach of its obligations under the JOC.

60. The Respondents' reference to PERTAMINA's letter of March 11, 1998, where it approved the revision of the "1998 Work Program Budget" as an evidence of approving KBC's works and plan for the Project, in the hope that the Project would be resumed is not convincing. This letter was sent in reply to KBC's March 5, 1998 letter where KBC was indicating that *"because of the Presidential Decrees, we will not be able to complete our original proposed program for 1998 as was previously submitted"*. Consistent with its legitimate decision to suspend its operations, notified by its February 10, 1998 letter, KBC was rescheduling such operations in the fourth quarter of 1998 under the assumption that the project would have been resumed at that time. Thus, PERTAMINA was just accepting KBC's decision—as it had to since KBC was entitled to invoke Force Majeure- but was cautious enough to order KBC to *"immediately make any necessary adjustments to the 1998 WP&B"* if other provisions relating to the Presidential Decree n.5/1998 so required. Far from manifesting an intention to approve KBC's continuation of the works, PERTAMINA was approving the suspension of the works and was warning KBC to abide fully by the Presidential Decree. The Arbitral

Tribunal is satisfied that this letter was in line with the instructions given by PLN in its letter of March 6, 1998 and could not be construed otherwise.

61. The fact, raised by the Respondents, that PLN's letter of March 6, 1998 was sent after KBC had already notified in February 10, 1998 that it was suspending its own performance does not exonerate the Respondents from their liabilities. Since the Presidential Decrees were for KBC a Force Majeure Event, KBC was entitled to suspend its activities. On the contrary, since they were not a Force Majeure Event for them, PLN and PERTAMINA had no legitimate excuse to do so. A legitimate action by a contracting party cannot justify an illegitimate action by the other contracting party and, as a matter of fact, neither PLN nor PERTAMINA did rely on KBC's notification of Force Majeure as justification for their own non-performance at the time. Moreover, in its February 10, 1998 letter, KBC was urging PERTAMINA and PLN to "*use* [their] *best efforts to bring about the continuation of the project*". To say the least, PLN's letter of March 6, 1998 brought to an end KBC's hopes in this respect. The same can be said of PERTAMINA's letter of March 11, 1998.

62. According to the Arbitral Tribunal, it is in the light of the above that KBC's contention that, in breach of its contractual obligations pursuant to article 15.1 of the ESC (the "further assurances" clause), PLN failed to give assurances that it would respect the ESC must be considered. The Respondents are correct to state that KBC never made a specific request for "*assurance of performance*". But, as it has just been seen stated, KBC expressly asked the Respondents to use their best efforts to bring about the continuation of the Project. This was a clear reference to the provisions of Section 15.1 of the ESC and Article 21.1 of the JOC. Both read:

> "*Each of the parties agrees to execute and deliver all such former instruments, and to do and perform all such*

further acts and things, as shall be reasonably necessary or appropriate to carry out the provisions of this contract".

Neither PLN nor PERTAMINA provided KBC with assurances that they would meet their obligations under this provision. On the contrary, their behavior was indicating that they would not and that they would just abide by the Presidential Decrees.

63. It is true that PERTAMINA's letter of February 11, 1998 to the Chairman of the Agency for National Development Planning represented a serious attempt at an early stage to convince the Government of Indonesia to reconsider its position. However, there was apparently no follow up before the filing of the Notice for Arbitration on April 30, 1998. In particular, no meeting with PLN, PERTAMINA and KBC was organized as required by KBC on February 10, 1998, which could have given some assurance to KBC that the appropriate efforts to have the project resumed was made. On the contrary, PLN's letter of March 6, 1998, not objected to by PERTAMINA, was a clear message that nothing was being done or expected to be done. At a meeting held on May 8, 1998, in PERTAMINA's office, KBC was informed that: *"according to Bappenas the steps to be taken for the continuation of the geothermal projects will be hopefully decided by June 1998"*. But, at the same meeting, it was also indicated that *"PERTAMINA received an idea from private industry to organize a seminar between the Industry participants and the New Minister for Mines and Energy for the purpose of informing the Minister of the position and the importance of the Geothermal industry"*. The proposed date for the seminar was October 1998, which understandably led KBC's representative to reply that *"the October date seemed late and would strain investor patience"*. This does not provide the impression of extensive efforts by PERTAMINA, to use the Respondents' own terminology in their Post Hearing Memorial (p.12).

64. The Arbitral Tribunal appreciates the fact that PERTAMINA wrote a further letter on June 11, 1998 to the Director General of Oil and Gas. However, this letter is not reflecting extensive efforts in order to obtain that the Karaha Project be resumed. It is nothing more than a request for clarification of the situation 6 months after the Presidential Decree n.5/1998 was issued and 5 months after PERTAMINA's previous letter of February 11, 1998. This letter states:

> *"Since the issuance of the Presidential Decree n.5 year 1995 dated 10th January 1998 until now there is no [sic] any sign from the Government regarding the continuation of the project, while PT PLN (Persero) via President Director letter n.107/037/DIRUT/1998-R/M and n.114/037/DIRUT/1998-R/M dated 6th March 1998 had informed all JOC Contractors that all activities for the JOC who's under list of Presidential Decree n.39 year 1997 and n.5 year 1998 should carried [sic] their risk and responsibilities by their self.*
>
> *The unconfirmed condition is creating difficulty to all JOC contractors to do the future plans, cause as the statement from PT PLN (Persero) that the communication in the JCM Forum is practically stop [sic]. Where's the JCM meeting is very important to anticipate what we should do earlier, if the projects continue again.*
>
> *Furthermore this condition has a direct impact to stop the activity of contractor's negotiation of geothermal projects who had the Principle License from Minister of Mines and Energy. The I/P will be expired.*
>
> *In connecting with that we would like to request the Government consideration for clarification and guidance as soon as possible for the continuation activity of geothermal projects who's [sic] under Kepress*

n.39/1997 and n.5/1998 and further negotiation of JOC and ESC contracts who had the I/P.

For your further review and consideration, herewith we attached (sic) the status of geothermal projects on the area where JOC and ESC has been signed, also the progress status JOC and ESC negotiation prospects which had the I/P already from Minister of Mines and Energy".

This letter indicates that when PERTAMINA, at the May 8 meeting, conveyed to KBC the indication that a decision would hopefully be made in June 1998, it was just distillating unfounded expectations. This letter was also implicitly confirming that PERTAMINA had done nothing since February 10, 1998 to reverse the situation and that PLN was still standing firm by the content of its March 6, 1998 letter.

In the circumstances, the Arbitral Tribunal is satisfied that the Respondents have breached their respective obligations under Section 15.1 of the ESC and Article 21.1 of the JOC. Such further breach aggravates the breach constituted by the decision not to perform the contracts as a result of the Presidential Decrees by adding a violation of the duty of performance in good faith of the Contracts. Not to perform a contract because a Governmental decision makes it momentarily impossible is one thing: depending on the allocation of risk among the parties, one of them may be declared liable towards the other, but good faith is not at stake. On the contrary, when the non performing party fails to do its best efforts to reverse the Governmental decision, although it has the contractual obligation to do so and is in a position to efficiently intervene, as PLN and PERTAMINA were, such failure being incompatible also with the contractual good faith and the legitimate expectation of the parties makes the breach particularly relevant.

65. However, even if the Respondents had actually used their best efforts in order to obtain that the Karaha Project be resumed, as they were contractually bound to, they would still be in breach of their obligations to perform the contract, since the Presidential Decrees were not a legitimate excuse for their non performance. Contrary to the Respondents' assertions, this conclusion is reinforced by the fact that the Respondents had a further obligation to assist KBC in its relation with the Government (Article 11.2 (c) and (d) of the JOC; Section 4.3 of the ESC), as pointed out by the Arbitral Tribunal on p.19 of its Preliminary Award in order to confirm that the contracts treated the Respondents and the Government of Indonesia as different entities. The provisions of Section 15.1 of the ESC and Article 21.1 of the JOC put on the Respondents further obligations to act, which when they are fulfilled but revealed to be unsuccessful, do not affect the allocation of risk resulting from Section 15.2 (e) of the JOC and Article 9.2 (e) of the ESC. Their unfullfilment [sic] is just, as mentioned above, a further breach aggravating the breach constituted by the non-performance of the Contracts resulting from Presidential Decrees.

66. In this context, the absence of Governmental related Events within the list of PLN's events of default provided under Section 11.2 of the ESC has no bearing on the problem at stake. As such, a Governmental Event is not a default by PLN. Nevertheless, the mere non-performance of the contract as a consequence thereof amounts to a breach by PLN as long as it has no other legitimate excuse to justify its failure to perform.

67. On the basis of the above, and with no need to consider the other allegations of breach raised by the Claimant, as grounds to the remedies it is seeking, the Arbitral Tribunal is satisfied that the Respondents are in breach of their obligations under the ESC and the JOC.

(B) Should the ESC and/or the JOC be terminated or is KBC entitled to Specific Performance?

1. The Claimant's position

68. According to the Claimant, the acts of PERTAMINA and PLN constitute an anticipatory repudiation of their obligations to respectively purchase and sell all electricity generated by KBC at contractually defined prices. Confronted with Mr. Dermawan's expert evidence that Indonesian law does not recognize the concept of anticipatory repudiation, the Claimant stresses that the expression of an intention to be bound no longer by a contract is a breach of the duty of good faith, which justify the termination of the contract. Indonesian law permits the termination of a contract in case one party has materially breached the contract.

69. The Claimant points out that Section 12.1 of the ESC and Article 20 of the JOC contain the following provisions: *"The parties hereby waive the provisions of article 1266 and 1267 of the Indonesian Civil Code with respect to the contract to the extent such waiver is necessary to terminate this contract without judicial agreement"*. It also denies that Section 11.3 of the ESC, which requires that a party in default be given a *"reasonable period to correct such default as may be mutually agreed"* would constitute an obstacle to termination.

70. As an alternative to termination, in its Revised Statement of Claims of November 24, 1999, the Claimant requests specific performance.

2. The Respondents' position

71. The Respondents deny that they have repudiated the Contracts at any time and stress that the concept of anticipating breach does not exist under Indonesian law. Although they admit that judicial termination of a contract may occur in case of breach, they stress that a party cannot unilaterally accelerate the obligations of the other party. They further indicate that termination is not a remedy for Governmental Related Events pursuant to the Contracts.

3. The Arbitral Tribunal's Decision

72. The Claimant has largely contributed to the complication of this question by referring at the same time to the different concepts of repudiation and termination. There is no doubt that, as pointed by Mr. Dermawan, the Respondents' legal expert, a common law concept such as repudiation may not fit within the civil law concepts prevailing in Indonesian Law. On the contrary, termination for breach is a concept familiar to all civil law systems, such as the Indonesian system, which does not need to be introduced through the different concept of repudiation as done by the Claimant.

73. Moreover, even if the concept of repudiation would be acceptable under the Indonesian legal system, the Arbitral Tribunal is not satisfied that either PLN or PERTAMINA have actually repudiated the Contracts. They have declared (PLN expressly, PERTAMINA implicitly) that they were suspending the performance of their obligations for an indefinite period, as the result of the 1998 Presidential Decree. Since they had no legitimate excuse to do so, this constitutes a breach of contract. The failure to do their best efforts to allow the Karaha Project to resume was another breach aggravating the first one by a breach of the duty to act of good faith. Such breaches entitled the Claimant to the termination of the Contracts, since, as none of the parties disputes it, breach of contract is a ground for termination under Indonesian Law. Contrary to the Respondents' contention, acceleration of their obligations is not an issue at stake. Even if it is correct that many of their obligations, in particular PLN's, were not to be performed immediately, the breaches committed had the consequence to indefinitely prevent the occurrence of the various triggering factors which would have made these obligations due.

74. In the light of the relevant contractual provisions, the discussion whether the Arbitral Tribunal has the power to declare the Contracts terminated is sterile. In both Contracts

(Section 12.1 of the ESC; Article 20 of the JOC), the parties have expressly accepted that the Contracts may be terminated by one of them without a judicial decision. Consequently, they necessarily accepted that termination might be decided by the Arbitral Tribunal.

Moreover, even without these contractual provisions, the Arbitral Tribunal would have the authority to terminate the Contracts simply in view of the parties' agreement to refer their future disputes to arbitration. By doing so, the parties have granted to the Arbitral Tribunal the jurisdictional authority that Indonesian Law grants to State courts with respect to termination of contracts.

75. The Arbitral Tribunal is of the opinion that none among the provisions of either contract could be considered an obstacle to terminate the Contracts. Section 11.3 of the ESC requires, before a party may terminate a contract, that a notice of default be issued by the said and that the defaulting party be granted "*a reasonable period to correct such default as may be mutually agreed*". This mechanism contemplated in the case of termination without recourse to the Arbitral Tribunal does not apply in case of termination by the Arbitral Tribunal. Moreover, it basically applies to those cases where the parties agree that a default may be cured, since they are supposed to agree on the period necessary to correct such default. It has no application when one of the party invokes a breach in front of the Arbitral Tribunal and the other one denies it. It that case, the normal rules of law applicable to termination apply. The same reasoning may be extended, mutatis mutandis, to Article 17 of the JOC.

76. Furthermore, the Arbitral Tribunal emphasizes the fact that six years elapsed since the execution of the Contracts and almost 3 years since the issuance of the n.5/1998 Presidential Decree that suspended their performance. Taking into account the failure by the Respondents to use serious efforts to make such performance possible in a foreseeable future, it

would be unreasonable and contrary to all the parties' interest, the spirit of the Contracts and the legitimate intent of the parties, which the Arbitral Tribunal must respect pursuant to Article 13.2 of the JOC and Section 8.2 (h) of the ESC, to maintain the parties indefinitely bound by contractual links.

77. On the basis of the above, the Arbitral Tribunal declares that both the JOC and the ESC are terminated.

78. Consequently, KBC's claim for specific performance, presented in the alternative, should be disregarded.

C. Is KBC entitled to damages?

79. There can be no doubt that in case of breach of contract, the prejudiced party is entitled to damages. This general principle of law, which is part of Indonesian law, has not been disputed by either party. Consequently, since the Respondents have been found in breach of their contractual obligations towards KBC, they are liable for the damages resulting thereof. Only the amount of such damages has to be consequently asserted.

The Claimant requests compensation for its lost expenditures and for its loss of profits. As an alternative to the compensation for loss of profits, the Claimant requests the amount of deemed dispatch payments.

(a) Lost expenditures

1–The Claimant's position

80. The Claimant seeks primarily to be awarded damages in return of KBC's capital investment together with a rate of return on that investment of between 15 and 16 percent. This Claim is based, according to the Claimant on the conceptual approach of contractual reliance damages, *damnum emergens*, followed in countless international arbitrations, and on the assumption that both Indonesian Law and well-accepted principles of international arbitration permit the assessment of

damages in conformity with the principles of equity in order to determine what is fair and just under the relevant circumstances.

81. The Claimant relies essentially on the evidence demonstrating that KBC expended US $ 94.6 Million (Ninety Four Million and Six Hundred Thousand U.S. Dollars) in reliance on the contracts and in fulfilling the contractual objectives. In this respect, the Claimant indicates that the documents and the testimony of Mr. Dan Campbell and Mrs. Barbara Bishop Gollan, tested under cross-examination, establish that KBC's costs of development were related exclusively to the exploration and development expenditures for the Project. Consequently, the amount of US $ 94.6 Million (Ninety Four Million and Six Hundred Thousand U.S. Dollars) should be considered undisputed and therefore payable with the interest.

82. According to the Claimant, the fact that the Project had not been pursued and carried out to earn profits does not have any effect, since, under Indonesian Law and all other systems adopting the concept of *damnum emergens,* KBC could not to be assumed to forfeit its capital expenditures incurred as a result of failure due to reasons beyond its control.

83. The Claimant equally refutes the Respondent's argument aiming to question the reasonableness of KBC's expenditures. The only relevant test, from the Claimant's point of view, relates to the proof that KBC's expenditures were spent on the Project, not for other purposes, without any need to establish the reasonableness of KBC's expenditures. Furthermore, the Claimant asserts that in any event the credible testimony of KBC's witnesses demonstrated that the expenses reflected prudent and reasonable decisions.

2–The Respondents' position

84. The Respondents deny as a matter of principle that the Claimant is entitled to recover any of its development expenses, on the basis that KBC acknowledged, in its letter to

PERTAMINA dated September 9, 1997 and its Financial Statements, that in entering into the JOC and ESC it assumed the risk that it would not be able to recoup those expenditures unless there were profits from the sale of electricity to PLN that were sufficient to offset the expenditures.

85. The Respondents maintain that since KBC is the party which has requested termination of the Project, it has to bear the consequences of not being able to earn profits sufficient to recover its costs. The Respondents add in this respect that it is axiomatic that a party to a contract cannot recover more than what it would have received had the contract been performed.

86. Moreover, the Respondents allege that KBC's expenditures were wasteful as a result of its poorly conceived and inefficient exploration program which conferred no benefit on PERTAMINA.

In reliance on certain Expert Reports submitted by the Respondents, it is claimed that KBC spent two years focusing its exploration efforts in an unproductive area in North Karaha and did not benefit from earlier resistivity programs which would have saved millions of dollars. KBC is also claimed to have mistakenly shifted its focus at a later stage to a crater area in Telaga Bodas, where it should have expected to encounter adverse chemistry that would render development commercially impracticable.

87. Although the Respondents submit that, as a matter of principle, no exploration and development expenses should be recoverable, it requests that *"any award should be reduced, at the very least, by the US $ 32.2 Million (Thirty Two Million and Two Hundred Thousand U.S. Dollars) of wasteful expenditures documented by Mr. Layman"* (in his First Report at 8-9).

88. Furthermore, the Respondents maintain that KBC's claimed expenditures include million [sic] of dollars that would have to be duplicated by PERTAMINA, since those spent on the development of infrastructure and on the training of technical staff are no more of benefit as admitted by KBC itself in its lobbying efforts to the Indonesian Government in September 1997.

89. The Respondents raise equally the issue of certain expenditures paid to KBC's shareholder PT Sumarah for what is claimed to be for *"financing expenses"* and *"head office expenses"* which were in the form of an agreed percentage of KBC's total expenses. The Respondents submit in this respect that they should not be required to reimburse any of what they qualify as *"the undocumented and unwarranted payments made to Sumarah"*.

90. Finally, the Respondents argue that any award to KBC for its Development Costs which were in Indonesian Rupiah and not in U.S Dollar [sic] should be for the Rupiah value of the expenditures based on the exchange rates in effect when the expenditures took place.

Taking into account the dramatic decline in the value of the Rupiah in relation to the U.S dollar [sic] after most of the expenditures were made, the Respondents assert that an award in U.S. dollars would be grossly excessive and unfair even on the assumption that the expenditures claimed by KBC were of benefit to PERTAMINA.

3–The Arbitral Tribunal's Decision

91. Within the context of the present Arbitration, the contractual relations between the Parties fall under the category of what can be characterized as *"Long Term International Development Agreements"*, in which the foreign investor assumes at the beginning substantial obligations related to the financing, conception, construction and operating of technologically advanced facilities of an industrial complex in

view of exploiting natural resources available in the host country for the benefit of local public entities. In exchange for such commitments, the foreign investor acquires rights entitling it to obtain during the term of the contracts concluded with the local public entities, not only the recovery of his initial investments, but equally certain guaranteed benefits which ensure in final analysis a mutually agreed upon margin of profit.

92. The necessary correlation between the rights and obligations of the Parties inherent to such contractual structure leads to the logical and inevitable conclusion that whenever the foreign investor is prevented from pursuing the performance of the binding contracts it relies upon for reasons beyond its control which were imposed upon it by the public authorities of the host country, the foreign investor should not bear the consequences thereof. In other words, in this case the foreign investor is entitled to seek recoupment of its entire investment as an essential element of compensation, in the sense that due to the frustration of its legitimate expectations in reliance on the contracts previously concluded it has to be reimbursed for what he incurred as proven expenditures.

93. In application of the above-stated rule, it has to be noted that Article 1.1 of the JOC imposed on the Claimant the obligation to "arrange financing for the expenditures *"covering all various aspects of the "Geothermal Operations", which are defined in a manner that includes "any and all activities . . . . for the purpose of exploring, discovery, developing, producing, ... construction of the Field Facilitates and Electricity Generating"*, as well as *"the delivery and sale of Geothermal Energy or Electricity thus generated"*.

94. In exchange for undertaking all the above-stated activities fully financed by the Claimant, it was granted by the explicit wording of Article 5.1 *"exclusive and irrevocable right and license during the term of this Contract to use the Contractual area"*. Within the contractual balance, this

constitutes the counterpart that permits it to expect generating throughout the thirty years an income sufficient enough to recover its expenditures and to realize a meaningful margin of profit. Among the other basic guarantees provided to the Claimant figures the assurance contained in Article 6.3 of the JOC with regard to the *"Electricity Produced"*, according to which PERTAMINA committed itself not to *"cause or allow any termination, amendment"* of the Agreement *"without the prior express written consent of Contractor"*.

95. Similarly, the ESC concluded with PLN contained various dispositions providing parallel rights and obligations as well as granting assurances about the purchasing of the electricity produced according to guaranteed prices calculated on the basis of the same currency of the expenditure initially provided by the Claimant; i.e.: in U.S. dollars (Sections 1, 2 and 5 of the ESC).

96. The Arbitral Tribunal is bound to give full faith and credit to all the contractual provisions referred to hereinabove taken in their entirety as reflecting a philosophy of balanced equilibrium between the rights and duties of the Parties, particularly in the light of the guidelines provided for by the Parties themselves in Article 13.2 (b), of the JOC and the identical text of Section 8.2 (b) of the ESC. The rules stated therein expressly indicate, on the one hand, that the interpretation and application of the chosen governing Law, which is Indonesian Law, should be carried in a manner *"consistent with the spirit of this Contract and the underlying intent of the Parties"*, and require, on the other hand, the *"correct interpretation of all relevant terms hereof and the correct and just enforcement of this Contract in accordance with such terms"*. Thus, giving supremacy to a comprehensive construction and mandating the adoption of solutions arrived to in strict compliance with the spirit and the legitimate expectations of the Parties as understood from the global textual structure of the contractual documents.

97. At the same time, it has to be noted that the Legal Opinions submitted by the Experts of both sides are in agreement at least on one point, which relates to the fact that Articles 1243 - 1252 of the Indonesian Civil Code, which is the chosen applicable Law, entitle the non-breaching party to claim as *damnum emergens* monetary reparation that compensates it for the expenses incurred in reliance on the Contract (First Expert Report of Robert Hornick, annexed to The Claimant's Revised Statement of Claims §11 : and Expert Opinion of Didi Dermawan submitted as Exhibit (E) to Respondent's Reply to The Claimant's Revised Statement of Claim and First Memorial, §9).

98. Taking into account all the above-stated considerations, the Arbitral Tribunal is of the opinion that the Claimant has to be awarded as *damnum emergens* the aggregate of the expenditures incurred in reliance on the two Contracts concluded with the Respondents by recovering the capital invested on activities pertaining to the JOC with PERTAMINA in anticipation of profits to be realized in the future under the ESC with PLN.

99. Contrary to what is argued by the Respondents, at no time has the Claimant ever questioned its entitlement to recover the sums invested in the Project under consideration, or implied *a priori* that it waived any rights deriving from the Contracts or vested by Law.

In more concrete terms, neither the letter of KBC to PERTAMINA dated September 9, 1997, nor the Financial Statements or any subsequent document related to KBC's lobbying efforts in both Indonesia and the United States could be construed in a manner consistent with the Respondents' point of view in this respect. The Claimant's constant position throughout that period was simply to emphasize the risk that the adverse effects of an event such as a prolonged suspension of the Project would have, causing the loss of the already advanced sums of money expended on the Project.

100. With regard to the Respondents' other argument alleging that part of KBC's expenditures totaling US $ 32.2 Million (Thirty Two Million and Two Hundred Thousand U.S. Dollars) were wasteful as a result of its poorly conceived and inefficient exploration program which conferred no benefit on PERTAMINA according to the Respondents' Expert Reports submitted in the present proceedings, the present Arbitral Tribunal is in full agreement with the rule clearly stated by the *Himpurna* Arbitral Tribunal, according to which:

> *"In the case of a breach of contract, the wasted cost is what the Claimant has spent in reliance on the agreement, without reference to how judicious or providential those expenditures turned out to be" (Himpurna California Energy Ltd - Bermuda Case, Final Award, § 445 at pp. 130 - 131).*

Indeed, the Respondents' breach has deprived the Claimant's expenditures of any value for the Claimant. The Respondents are not entitled to question now their original appropriateness since they have put the Claimant in a position where it cannot take any advantage of them for the benefit of the Project and demonstrate in concreto their usefulness.

101. Accordingly, the Claimant has as a matter of principle to be compensated for all the proven sunken costs which were incurred with regard to activities carried out in reality, without any need to enter into an *ex post facto* debate about whether such expenditures were reasonable and profitable or not. In other words, the Claimant is entitled to recover all costs and investments adequately proven and directly related to the works undertaken in implementation of the Contracts concluded with the Respondents.

102. The same test applies with regard to the expenditures paid to KBC's local shareholder PT Sumarah and which are claimed by the Respondents to be questionable. Nothing in

the records sustains any accusation of impropriety with regard to PT Sumarah involvement as a publicly disclosed shareholder of KBC whose name appears on the Financial Statements and Reports submitted to both Respondents. The sums received by the said local Partner as *"financing expenses"* and *"head office expenses"* were openly declared and contained in the expenditures communicated to the Respondents and which did not raise any objection until recently in the course of the present proceedings. The mere fact that the said expenses took the form of an agreed percentage does not imply dissimulating improper payments. Hence, the Arbitral Tribunal considers the allegations about the unwarranted nature of such payments unfounded, and consequently rejects the objection to their reimbursement.

103. As to the argument raised by the Respondents according to which any sums awarded to KBC for recovery of its development costs should be in Indonesian Rupiah and calculated according to the rate of exchange that was prevailing when the expenditures were incurred, the Arbitral Tribunal finds no difficulty in rejecting such submission since there can be no doubt according to the available records that all expenditures incurred by the Claimant were deriving from funds obtained in U.S. dollars from foreign sources, particularly from the American shareholders themselves, and injected in the national Indonesian economy to cover local expenses. The fact that certain dollars were subsequently converted into Indonesian Rupiah to cover expenses due in this currency has no relevance since the investment was originally paid in U.S. Dollars. Accordingly, the reimbursement should be in the same initial currency. Otherwise, the Claimant would incur undue losses which are unjustified legally and as a matter of justice.

104. Taking the above-stated factors into consideration, the Arbitral Tribunal relies, in fixing the quantum of the expenditures forming the investments to be recovered, on the

documents submitted related to KBC's Project Expenditures which figure on the Work Programs and Budgets for the years 1995-1998 and which are deemed approved by PERTAMINA in accordance with the rule provided for in Article 4.3.1 of the JOC that requires PERTAMINA to indicate its approval or disapproval within 30 days.

105. In the absence of any proof that such disapproval took place, the Arbitral Tribunal considers the Claimant entitled to obtain reimbursement of the proven and uncontested expenditures amounting to: US $ 8.3 Million (Eight Million and Three Hundred Thousand U.S. Dollars) for the year 1995; US $ 26.4 Million (Twenty Six Million and Four Hundred Thousand U.S. Dollars) for the year 1996; US $ 48.5 Million (Forty Eight Million and Five Hundred Thousand U.S. Dollars) for the year 1997; and US $ 9.9 Million (Nine Million and Nine Hundred Thousand U.S. Dollars) for the year 1998; having a total of US $ 93.1 Million (Ninety Three Million and One Hundred Thousand U.S. Dollars).

106. With regard to the sum of US $ 1.6 Million (One Million and Six Hundred Thousand U.S. Dollars) claimed to have been spent in 1999 after the end of all operations undertaken in reliance on the Contracts, there are no work program or budget submitted for PERTAMINA's approval and the Arbitral Tribunal is not in possession of documents evidencing the various items which are included in such global claim in order to verify their accuracy and relevance. Consequently, the claimed sum of US $ 1.6 Million (One Million and Six Hundred Thousand U.S. Dollars) is disallowed, since it could not qualify as sufficiently proven investments incurred by the Claimant in reliance on the Contracts.

107. After deciding that the *damnum emergens* due to the Claimant to compensate it for its lost investments amounted initially to a total of US $ 93.1 (Ninety Three Million and One Hundred Thousand. U.S. Dollars) at the relevant time

when performance in reliance on the Contracts came to an end, the Arbitral Tribunal has to establish the present value of these lost investments.

In order to achieve this difficult task, the Arbitral Tribunal has to base its ruling on the only solution available according to the evidence submitted by the Claimant's Expert, Professor Ruback, which is the *"risk-free rate"* that equals 5.8 % per annum, being the rate on a 20-year US Government Bond at the relevant time (Rebuttal Report of Richard S. Ruback, dated May 8, 2000, § 8, at page 4).

The recourse to such *"risk-free rate"* represents the advantage of serving as conservative measure indicating what would be the least non-speculative yield that a prudent person could have earned by placing the amount in question at a secured type of investment.

In undertaking a calculation based on such indicator with regard to each sum as of the end of the year when it was initially disbursed by the Claimant to cover the expenditures of the Karaha Bodas Project and until the end of the year 2000, the total aggregate indicates what the Arbitral Tribunal considers the present value of the lost investments that the Claimant is entitled to recover under the heading of *damnum emergens*, i.e.:

1995	US$ 8.3 million + (8.3 million x 5,8% x 5) =	US$ 10.7 million
1996	US$ 26.4 million + (26.4 million x 5,8% x 4) =	US$ 32.5 million
1997	US$ 48.5 million + (48.5 million x 5,8% x 3) =	US$ 56.9 million
1998	US$ 9.9 million + (9.9 million x 5,8% x 2) =	US$ 11.0 million
TOTAL		US$ 111.1 million

108. The Claimant requests that the Respondents be condemned to pay damages jointly and severally. It results from the finding of the Arbitral Tribunal that the Respondents have concurred jointly and to the same level to the occurrence of the damage by their respective breaches of their contractual obligations.

Thus, the Arbitral Tribunal condemns jointly and severally the Respondents to pay to the Claimant an amount of US$ 111.1 million as damage for lost expenditures.

(b) Lost profits

1. The Claimant's position

109. In addition to its lost investment, the Claimant requests a second type of damages, namely lost profits associated with the loss of geothermal development opportunities.

The Claimant underlines that no double counting will occur by reason of such request since its estimate of lost profits subtracts its prior investments as evidenced by the Report of its expert, Professor R. Ruback of the Harvard Business School.

110. The Claimant asserts further that this claim is perfectly valid under Indonesian law. The latter provides, among the remedies for breach of contract, damages which include lost profits, as evidenced by the Claimant's legal expert, Robert Hornick, the Respondents' legal expert having taken no issue on the subject. Citing the awards in Himpurna and Patuha Power Cases, Claimant refers to Article 1246 of the Indonesian civil code providing that damages may include *"the loss which the creditor has suffered and the profit he has been made to forego"*.

111. As to the assessment of such type of damages, it is the Claimant's position that both under Indonesian Law and well-accepted principles of international arbitration the relevant amount may be determined *ex aequo et bono*.

According to the Claimant, its lost profits claim is supported by the evidence, considering that a claim of this nature needs not be demonstrated with absolute certainty but only be estimated.

112. The evidence which has been produced by the Claimant shows that the available geothermal reservoir would have supported at least 210 MW of generating capacity, Respondents misconstruing 55 MW and 110 MW references in the Project documents. The evidence further indicates that one of the Claimant's shareholders, FLP [sic] Energy, Inc., would have provided bridge financing, recourse financing or direct capital investment for the Project, assuming PNL [sic] and PERTAMINA were performing their contractual obligations. FLP [sic] Energy would have provided such financing because, among other reasons, it had already invested US $ 40 million in the Project and because the ESC and JOC are dollar denominated, the Project has possibility of development of greater than 210 MW and the ESC obligates PNL[sic] to obtain a letter of support from the Government acceptable to lenders.

113. The Claimant's lost profit caculation is based on the projected cash flows, *i.e.* future revenues, from the Project, calculated on the basis of specified quantities (*i.e.* 210 MW) to be delivered to PNL [sic] in exchange for energy and capacity payments provided by the ESC. Considering that the projection of future revenues extends over the thirty years of duration of the ESC, an appropriate discount rate is to be applied. According to its expert, Professor Ruback, such rate is 8.5 percent. Based on the evidence it has offered, the Claimant's claim for lost profits s equal to US $ 512.5 million, corresponding to a rate of return of approximately 16.2 percent.

114. As an alternative to lost profits based on the projected cash flows The Claimant claims "deemed dispatch" payments under the ESC. Section 9.3 (c) of the ESC requires PNL [sic]

to make "deemed dispatch" payments if the Claimant is unable to generate electricity as a result of an Event of Force Majeure, including a Government Related Event (as such terms are defined therein). In such a case the generating Unit will be deemed dispatched (*i.e.*, capable of delivering electricity) and PNL [sic] shall continue to be obligated to pay a sum equal to 90 % of the "energy payments" under Section 5.2 of the ESC and 100 % of the "capacity payments" under Section 5.3 of the ESC based on the MW volume set forth in the NOID (*i.e.*, 210 MW).

The amount claimed by the Claimant under this heading is equal to US $ 437 million, corresponding to a rate of return of approximately 15.3 percent.

2. *The Respondents' position*

115. The Respondents do not deny that under Indonesian Law, as in practically all legal systems, lost profits ("*lucrum cessans*") is a type of damage which may be assessed against a party liable for breach of contract, in addition to past expenditures ("damnum emergens").

However, apart from rejecting any liability for breach of contract or otherwise, the Respondents contend that the Claimant has failed to prove that it was ready, willing and able to perform the JOC and the ESC.

Specifically, according to the Respondents, the Claimant could not obtain the financing required to complete the Project, estimated by the Claimant itself to be over US $ 500 million.

As admitted also by the Claimant, non-recourse project financing was unavailable at that time because of the economic and political turmoil in Indonesia (and not because of the Presidential Decrees or any acts by the Respondents). The Respondents recalls that non-recourse project financing was precisely the type of financing contemplated by the ESC

and the only one for which PNL[sic] had any obligations to seek a Government support letter under the ESC.

116. The Respondents note further that in order to overcome these problems the Claimant has asserted that one of its shareholders, FPL Energy, would have provided the required financing for an indeterminate period until political stability would return in Indonesia and project finance again become available.

However, in Respondents' view these assertions are not credible, no evidence having being offered to substantiate FPL Energy's stated availability to provide this huge additional investment, any decision in that regard requiring authorization from the Board of Directors of FLP [sic] Group Inc., a publicly held corporation whose Board consists primarily of outside, non-management directors.

Even if (contrary to all reason) the FPL Group Board were to provide such financing, it would have required, according to Respondents, a rate of interest (or a return on equity) commensurate with the severe risks it was undertaking due to the economic and political situation in Indonesia and the resulting downgrading of that Country's credit rating, with local government bonds yields having reached a level of more than 22% in 1998 (as shown in the report of one of Respondents' expert, Mr. Anderson). The rate of 8.5% at which in the Claimant's lost profit damage analysis it is assumed it would have been able to obtain such financing is, in the Respondents' view, absurdly unrealistic; it would have rather been at such a level as to leave no profit at all to the Claimant in its aforesaid damage analysis.

117. The Respondents challenge also the Claimant's contention that it has proven its ability to generate 210 MW of electricity based on the available geothermal reserves. In fact, it was not until its sudden–and highly suspect in the Respondents' view–December 1997 NORC update and NOID

that the Claimant ever claimed to contemplate producing more than 110 MW of electricity. The Respondents remark that the 1998 Work Plan prepared by the Claimant reported that the 1997 exploration activities resulted in proving 55 MW production capacity and that the plan in question would focus on proving the existence of additional reserves sufficient to develop up to 110 MW.

Even the Claimant's independent consultant, GeothermEx, recommended far less than 210 MW development. All experts' analysis whose reports have been filed by Respondents in these proceedings have confirmed that the Claimant's reserves estimate relies upon unproven and unrealistic assumptions and that the exploitable reserves are far below the 210 MW figure asserted by the Claimant.

Such experts, including the Claimant's own expert GeothermEx, have indicated the adverse geochemistry problems of the reservoir. Such problems may not, in the Respondents' view, be easily remedied and will entail in any case additional substantial investments for their elimination.

It is the Respondents' contention, therefore, that the Claimant has failed to meet its burden of proof that it could have built a 210 MW power plant.

118. Regarding the *"deemed dispatch"* theory, in the Respondents' opinion the ESC does not entitle the Claimant to deemed dispatch payments until it has constructed a Unit (as defined in the ESC) that has reached the Date of First Operation (as also defined by the ESC). Furthermore, deemed dispatch payments must be invoiced and paid monthly but the Claimant never submitted any such invoices. Finally, the deemed dispatch provision cannot be applied because there is no valid NOID and therefore no basis for determining the Unit Rated Capacity (as defined by the ESC) of the Claimant's non-existent Unit.

The Claimant's "lost profit" calculations, to be found in Professor Ruback's report, are in the Respondents' view unacceptable based as they are on a number of unrealistic assumptions.

Firstly, in his report Professor Ruback simply accepts, without any critical analysis, projected future operating cash flow statements given to him by the Claimant. Such cash flows assume, among other things, that the Claimant would have built 210 MW electrical generating facilities by the year 2001 and that it would have continued to operate those facilities for thirty years at practically full capacity, without any alternative scenario. Furthermore, these projected operating cash flows are discounted by Professor Ruback to their present value as of January 10, 1998 - the date of the Presidential Decree taken as "the date of the breach" - at a discount rate of 8.5%. The latter is comprised of a "risk free rate" equal to 5.8% and a "risk premium" of 2.7% based on the trading price for the stock of CalEnergy, a company claimed to be comparable to the Claimant (which Respondents deny to be so comparable).

According to the Respondents, in selecting such a discount rate the Claimant's expert has relied on a "guaranteed" contract ignoring completely what was happening in Indonesia in 1998 as well as the fact that the Claimant had not secured the financing necessary for the construction of its plant.

119. The use of an 8.5% discount rate dramatically understates the Claimant's true cost of capital in 1998 and by so doing it dramatically overstates its purported lost profits since such cost of capital would have been at least equal to 22%, this being the yield on Indonesian government bonds at that time.

As shown in the report of one of the Respondents' expert, Mr. Norris, the project is at a "break-even" point at a discount rate of 16.2% and is a US $ 100 million loss to the Claimant at

20%, even if all other assumptions underlying the Claimant's projected cash flows are accepted.

120. It is the Respondents' position, based on the report of its expert on Indonesian law, Mr. Dermawan, that damages must be proven and therefore when lost future profits are not actually demonstrated they may not be awarded.

The damage assessment may not be subject, in the Respondents' view, to principles of equity, a resort to ex *aequo et bono* by the arbitrator being prohibited in the absence of the parties' agreement, as provided by article 631 of the Indonesian civil code and article 33(1) of the UNCITRAL Rules.

3. The Arbitral Tribunal's Decision

121. Indonesian Law, like numerous other legal systems, provides for the recovery of lost profit ("*lucrum cessans*") as a component of the damages to which the innocent party is entitled in case of inexcusable breach of contract, in addition to the other damages component, the "*damnum emergens*".

As in other legal systems, recovery is limited to damages that were foreseeable when the contract was made and that are the immediate and direct result of the breach.

122. There is no doubt in the Arbitral Tribunal's opinion that the Claimant is entitled to obtain the benefit of its bargain in addition to recovering the expenditures it has incurred. As stated by the award in the *Himpurna California Energy Ltd. v. P (Persero) Perusahaan Listruik Negara*, filed by The Claimant in these proceedings, "*To limit the recovery of the victim of a breach to its actual expenditures is to transform it into a lender, which is commercially intolerable when the party was at full risk for the amount of investments made on the strength of the contract*" (paragraph 195 on page 143). The loss of a business opportunity *("perte de chance")* is

a widely recognized basis for the lost profits damages component.

123. In determining the amount of damages to which the Claimant is entitled under this heading no reliance may be attributed to the "deemed dispatch" payments to which the Claimant has made reference as an alternative basis for such determination.

As correctly pointed out by the Respondents, the obligation to make such payments presupposes that a Unit has been constructed which has reached the Date of First Operation. Furthermore, the "deemed dispatch" payments are due only in case of Force Majeure and for so long as the Force Majeure Event continues. They could not constitute, therefore, the basis for determining profits lost for the thirty-year term of the ESC.

124. The issue confronting the Arbitral Tribunal in the present case is that it is requested to assess with a reasonable degree of confidence the level of profits which the Claimant might have legitimately expected to earn out of a project which had not yet reached the stage of full development and which would have been subject to the vagaries of a number of risks typical of this kind of projects in a country such as Indonesia.

Few considerations, however, appear relevant as guidelines for reaching the required level of confidence regarding the determination of the issue in question.

125. The most important of such considerations is represented by the contractual arrangements agreed between the parties.

The JOC and the ESC, taken together, represent for the Claimant the guarantee that once electricity would have been ready for sale out of its plant (or plants) a customer would have been available, namely PLN, contractually bound for

thirty years to purchase the entire production at a price based on a pre-agreed formula, to be paid in US dollars. The Respondents' obligations would have been secured by a supporting letter from either the Minister of Finance or the Minister of Mining and Energy of Indonesia, a condition required by the banking system to lend the financing necessary for the project implementation. Moreover, any intervention by the Government affecting the contractual performance would have constituted a force majeure event excusing only the Claimant, not the Respondents.

126. Thus, the most significant risks for the foreign investor normally associated with a project of this nature, including the commercial risks of market availability and price fluctuations, the currency and inflation risks and the risk of governmental interference would have been eliminated under the parties' contractual arrangements.

127. Quite rightly, the Respondents have underlined that other risks might have affected the economic results of the project during its development stage, such as–to mention the most significant ones–possible delays in the plant's construction and operation, actual availability of reserves in the quantities estimated by the Claimant, availability of the financing necessary for the project implementation at an acceptable cost.

These risks, although to be taken into account, appear to the Arbitral Tribunal less troublesome than the ones against which the JOC and the ESC afforded to the Claimant the necessary protection.

128. As to the quantities that should be covered by PLN's off take obligation, it may be recalled that according to the JOC (Articles 4.5 and 4.6) the Claimant is entitled to give PERTAMINA notice of its intent to develop quantities of Geothermal Energy (as therein defined) by submitting a NORC followed, after at least 90 days, by a NOID.

According to the JOC, PERTAMINA may "*technically evaluate*" the Geothermal Energy under the NORC, a circumstance possibly leading to a consultation between the parties regarding quantities of Geothermal Energy and other pertinent technical data. The Claimant would have been free, however, after not less than 90 days, to send PERTAMINA the NOID, whereupon the latter had to give notice to the buyer PLN of the Claimant's intent to proceed with the development of the Geothermal Energy and the construction of the necessary Unit(s). On its turn, the ESC provides (Section 4.2) that PERTAMINA has to consult with PLN prior to giving the latter the aforesaid notice to ensure that the proposed generating facilities are designed in a manner compatible with the Java Transmission System. No provisions are made by either the JOC or the ESC for Respondents' right to object or oppose to the Claimant's intent to develop reserves in the quantities indicated in the NORC and the NOID.

129. After submitting a NORC in September 1997, the Claimant has notified to PERTAMINA both an updated NORC and a NOID on December 16, 1997, confirming that at least 210 MW of energy reserves would have been available for development. The Respondents have criticized said notices by contending that they were given without respecting the 90-day required interval and, moreover, that they were suspect since the quantities of reserves indicated in the prior September NORC had been significantly increased without justification and this in a period of uncertainty regarding the Project development by reason of the Presidential Decrees.

It is to be remarked that only during these proceedings the Respondents have raised this kind of objections to the Claimant's NORC and NOID of December 16, 1997. Moreover, the record indicates the parties' agreement in writing not to respect the contractually agreed 90-day time interval

for notifying the December 1997 NORC and NOID (the minutes of the 14th October 1997 Joint Committee meeting which record such agreement have been signed by both parties) and the absence of any reaction by the Respondents in respect of such NORC and NOID.

Under the JOC and the ESC, therefore, had their performance been continued as originally foreseen, the Claimant would have been entitled to develop reserves in the quantities notified by it.

130. It is also to be noted that said notifications by the Claimant intervened in a period of time during which the suspension of the Project, ordered by the Presidential Decree n. 39/1997 of September 20, 1997, had been cancelled by the subsequent Decree n. 47/1997 of November 1, 1997 so that the Respondents' reservations about the genuineness of the Claimant's notices appear unjustified.

131. This being said, the Arbitral Tribunal does not undervalue the possibility that the quantity of 210 MW of exploitable reserves in the Contract Area put forward by the Claimant might have resulted to be overestimated. It will accordingly give weight to this circumstance when making the allowance for lost profits.

132. Regarding the financing necessary for the Project development, there is no reason in the Arbitral Tribunal's opinion to cast doubts about the Claimant's readiness, directly and/or through its shareholders, to make provision thereof.

The December 16, 1997 NORC and NOID are indicative of the Claimant's intent to proceed with the development of Geothermal Energy in the announced quantities and to the construction of the necessary Units. Consistently therewith, the Claimant requested on January 5, 1998 the competent Indonesian authority permission to make use of the fund allocation facility for the amount of US $ 380 million.

After the revocation of Presidential Decree n. 47/1997 by Decree n. 5/1998 of 10 January 1998, the Claimant exercised all possible pressure, through various political and diplomatic channels, to generate support for the resumption of its Indonesian project. It also requested PERTAMINA, on January 23, 1998, to intervene with the local authorities to obtain the resumption of the Project.

The attitude of the Claimant as evidenced by the above actions reflect, in the Arbitral Tribunal's opinion, the Claimant's continued confidence in the viability and profitability of the Project in spite of then emerging political and economic difficulties of the Country. It is only logical to assume that such difficulties would have been overcome with the passing of time and the adoption of the measures prescribed by the IMF.

133. That notwithstanding, the issue remained open in 1998 of the terms and conditions upon which financing could have been obtained for the Project development. Although it is to be assumed for the purposes of this evaluation that both the JOC and the ESC would have continued to be performed according to their terms and that a Government support letter would have been available as contemplated by the ESC (Section 4.3 (ii)), the worsening of the economic and political situation in Indonesia at that time has to be taken into account as regards both the conditions at which financing could have been obtained and possible delays in arranging the same. It may recalled in this respect that the possibility of a delay in securing the necessary financing was in the parties' contemplation, the ESC providing that in case the Claimant is unable to arrange financing the contract may be suspended for a period of up to 2 years (Section 4.3).

134. As already mentioned (*supra*, paragraph 127), a number of risks against which no protection was afforded by the JOC and the ESC have to be taken into account, including a cost of capital higher than estimated in the Claimant's cash flow

projections, delays in plant(s) construction and operation and reserves exploitable in quantities lower than expected and/or entailing investments and operating costs for an amount higher than the amount assumed for purposes of such cash flow projections.

135. One way of assessing the impact of these various risks over the lost profits amount claimed by the Claimant would be to apply a discount rate in the latter's cash flow projections higher than the one proposed by the Claimant by appropriately increasing the "risk premium" component of such rate. This would imply, however, that it would be possible to evaluate with a sufficient degree of certainty the cumulative effect of such various risks and to translate it into such a higher percentage.

136. The too many variables involved by such evaluation process suggests that different approach should be taken which, after duly considering these various factors, would entail a significant reduction of the Claimant's lost profits claim. The Arbitral Tribunal, after careful consideration of all elements involved in this analysis as enumerated above, and in the exercise of its inherent power to assess the quantum of damages on the basis of the evidence submitted by both parties, fixes at US $ 150 million (one hundred and fifty million US dollars), the amount of lost profits to which the Claimant is entitled.

For the reasons explained under paragraph 108, the Respondents are condemned jointly and severally to pay this amount to the Claimant.

D–Is KBC entitled to compensation for unjust enrichment?

137. The Claimant's request for compensation for unjust enrichment is presented as an alternative " *in the event that KBC* cannot *recover under the JOC or ESC"* (Post Hearing Memorial, n°196, p.67). Since the Arbitral Tribunal has granted the Claimant remedies under the contracts, its request

for compensation for unjust enrichment is moot and has not to be considered by the Arbitral Tribunal.

E–Interests

138. The Claimant is asking interests on the amounts to be granted to it as from January 10, 1998.

Since the Arbitral Tribunal is compensating the Claimant for the value of its lost expenditures at the end of year 2000, no interest should be paid by the Respondents before that date in this respect, since such evaluation meet [sic] its request for interest.

As the profit, the loss of which this award is compensating would not have been made before several years after January 10, 1998, interests on the amount granted in this respect cannot accrue before the date of this award.

Considering that International Arbitral Tribunals enjoy a large freedom when fixing the rate of interest, taking into account the money of payment, the respective situation of the parties and the circumstances of the case, the Arbitral Tribunal decides that the amounts granted by the Arbitral Tribunal will be increased by interests at the rate of 4% per annum as from January 1, 2001, until the date of full payment.

F–Costs of the arbitration

139. The Claimant and the Respondents have respectively requested that all the costs and expenses of the arbitration, including costs of legal representation and assistance be borne by the other side. This cannot apply to the costs and expenses relating to the Preliminary issues which have been allocated by the Preliminary Award of September 30, 1999. This matter has already been resolved by that award and thus, in case the amounts granted for costs in the Preliminary Award have not been paid, decision of awarding interest on such amounts is beyond the jurisdiction of the Arbitral Tribunal

but within the jurisdiction of the authority to which enforcement is requested.

140. According to Article 40 (1) of the UNCITRAL Arbitration Rules, "The costs of arbitration shall in principle be borne by the unsuccessful party. However, the Arbitral Tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case". In this case, the Respondents have been unsuccessful on the principle but a significant part of the quantum requested by the Claimant as damages has been denied by the Arbitral Tribunal. In such circumstances, the Arbitral Tribunal considers that it is reasonable that the Respondents bear 2/3 (two thirds) of the costs and expenses of the arbitration and the Claimant 1/3 (one third).

141. The costs and expenses of the arbitration for this second and final phase of the arbitration are fixed as follows:

Arbitrators Fees

Yves DERAINS	US $ 146.337,00
Piero BERNARDINI	US $ 109.752,69
Ahmed EL KOSHERI	US $ 109.752,69

The expenses of the Arbitral Tribunal amounts to US$ 34.140,00. Thus, the costs and expenses of this second phase of the arbitration amount to US$ 399.982,38. This amount is covered by the deposit made by the parties, the Claimant having paid US$ 199.982,38 and the Respondents US$ 200.000. Since the Claimant has only to pay one third of the amount of US$ 399.982,38, the Respondents are condemned to refund it US$ 66.654,92 for the costs and expenses of the arbitration.

142. With respect to the costs of legal representation and assistance, Article 40 (2) of the UNCITRAL Arbitration Rules gives freedom to the Arbitral Tribunal, taking account

the circumstances of the case, to determine which party shall bear such costs or to apportion such costs between the parties if it determined that apportionment is reasonable.

Considering the various aspects of this case, the variety of the claims filed by the Claimant in the alternative and the technical problems raised by its huge claim for loss of profits, the Arbitral Tribunal determine that each party will bear its own costs of legal representation and assistance.

ON THE BASIS OF THE FOREGOING, THE ARBITRAL TRIBUNAL FINDS AND DECIDES AS FOLLOWS:

1—PERTAMINA and PLN have breached the ESC and PERTAMINA has breached the JOC.

2—PERTAMINA and PLN are jointly and severally condemned to pay US$ 111.100.000 million (one hundred eleven million and one hundred thousand US dollars) for lost expenditures to KBC, plus interest at the rate of 4% per annum, as from January 1st, 2001, until the date of full payment.

3—PERTAMINA and PLN are jointly and severally condemned to pay US$ 150 million (one hundred and fifty million US dollars) to KBC for loss of profits, plus interest at the rate of 4% per annum, as from January 1st , 2001, until the date of full payment.

4—PERTAMINA and PLN, are jointly and severally condemned to pay US$ 66.654,92 (sixty six thousand and six hundred fifty four US dollars and ninety two cents) to KBC for the costs and expenses of this second and final phase of the arbitration, plus interest at the rate of 4% per annum, as from January 1st , 2001 until the date of full payment.

5—Each party shall bear the costs incurred for its legal representation and assistance.

6—All other claims of the parties are declared moot or dismissed.

Made in Geneva; on December 18th, 2000

/s/ Piero Bernardini
PROF. PIERO BERNARDINI

/s/ Ahmed S. El Kosheri
PROF. AHMED S. EL KOSHERI

/s/ Me Yves Derains
ME YVES DERAINS

(3)

Supreme Court, U.S.
FILED
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No. 03-1688

In The
Supreme Court of the United States

PT PERTAMINA (PERSERO), f/k/a PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA,

Petitioner,

v.

KARAHA BODAS COMPANY, L.L.C.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Karaha Bodas Company, L.L.C., has no parent corporation and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

This is a straightforward commercial case involving the breach by Petitioner PT Pertamina (Persero), f/k/a Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina") of two contracts granting Respondent Karaha Bodas Company, L.L.C. ("KBC") the right to produce and sell electricity generated from geothermal resources in the Karaha Area of West Java, Indonesia (the "Project"). In December 2000, a unanimous three-member international arbitral tribunal held that Pertamina had breached those contracts and ordered Pertamina to pay KBC $261.1 million (the "Award"). As part of its continuing efforts to avoid and delay the enforcement of the Award, Pertamina now claims that this Court should review the unique circumstances in which the arbitrators were appointed and the lower courts' approval of that procedure. For several reasons, this issue does not warrant the Court's review.

First, the decision below does not conflict with the decision of any other court of appeals. Pertamina contends that the Fifth Circuit's decision creates a conflict between that court and four other courts of appeals on the issue of whether a court may defer to arbitrators' decisions regarding the appropriateness of their own appointment. A plain reading of the opinion below, however, demonstrates that the Fifth Circuit (and the district court for that matter) did not defer to the arbitrators on this issue. Instead, the Fifth Circuit conducted its own review of the facts and parties' agreements before holding that the arbitrators were properly appointed. The decision below thus does not conflict with the decision of any other court of appeals.

Second, even if the Fifth Circuit had deferred to the arbitrators on this issue, this case still would not present a circuit conflict that this Court should resolve. Each of the four cases on which Pertamina relies in claiming that a circuit conflict exists was decided before this Court's recent opinion in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), which held that courts must defer to arbitrators on matters of arbitration procedures and scope unless they are so-called "gateway matters." *Id.* at 452. In the year since *Green Tree Financial* was decided, no court has considered whether the propriety of an arbitrator's appointment is a "gateway matter" that calls for *de novo* judicial review. Thus, no conflict exists among the circuits on this issue.

In addition, each of the four appellate decisions cited by Petitioner involved a domestic arbitration, governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16. This case, by contrast, is an international arbitration, governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") (incorporated into United States law and codified at 9 U.S.C. §§ 201-208). Unlike the Federal Arbitration Act, the New York Convention has a specific provision addressing whether the confirmation and enforcement of an international award should be rejected because of the manner in which arbitrators are appointed. *See* 9 U.S.C. § 201, Art. V(1)(d) (recognition and enforcement of an award may be refused only if a party establishes that the "composition of the arbitral authority . . . was not in accordance with the agreement of the parties"). That provision was not at issue in any of the cases on which Pertamina relies, and for this separate reason, no conflict is presented here.

Third, even if a circuit conflict arguably existed regarding whether a court may defer to arbitrators' decisions

concerning the appropriateness of their own appointment, this would not be an appropriate case in which to address such a conflict. The decision below is supported by several alternative holdings, including: (1) Pertamina waived its right to object to the manner in which the arbitrators were appointed; and (2) Pertamina failed to prove that it suffered any prejudice as a result of the alleged improper appointment. Moreover, although Pertamina challenges the validity of the arbitrators' appointment under only one of the two contracts between Pertamina and KBC, the Award held Pertamina liable under *both* contracts. As a result, even if Pertamina prevailed on its challenge to the arbitrators' appointment under the first contract, it would remain liable to KBC under the second contract, where the validity of the arbitrators' appointment is not contested. For these reasons, a decision in Pertamina's favor on the question presented would not affect the outcome of this case.

This petition represents nothing more than Pertamina's most recent effort to thwart the international arbitration process to which it agreed when it entered into its contracts with KBC. The Award, issued almost four years ago by a unanimous and prestigious international tribunal, Pet. App. 58a-61a, remains unsatisfied. In addition to its repeated appeals, Pertamina has resolutely refused to post an appellate bond and has vigorously fought all efforts by KBC to collect the Award. Indeed, in a prior opinion arising from this same arbitration, the Fifth Circuit characterized Pertamina's efforts as "certainly sufficient grounds to find Pertamina's behavior dubious and somewhat deceptive." *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi*

Negara, 335 F.3d 357, 369, n.50 (5th Cir. 2003).[1] Pertamina's continued attempts to avoid its contractual obligations have threatened the integrity of international arbitration as a speedy and efficient dispute resolution mechanism and should be rejected.

COUNTER-STATEMENT OF THE CASE

In affirming the district court's decision confirming the Award, the United States Court of Appeals for the Fifth Circuit explained that "the length of this opinion reflects the number of arguments Pertamina raises to evade its obligations under the Award more than the strength of those arguments." Pet. App. 3a. Pertamina now relies on only one of those arguments, but in so doing misrepresents and omits significant facts from the voluminous record. KBC thus submits this counter-statement of facts.

The Parties, The Contracts, And The Project. Petitioner Pertamina is an oil, gas, and geothermal energy company wholly owned by the Government of the Republic of Indonesia. Pet. App. 4a. Respondent KBC is a geothermal energy exploration and development company that builds electric generating stations; its principal investors include Florida Power & Light Company. *Id.*; Pet. App. 7a. Pursuant to two contracts executed in 1994, KBC was granted the right to develop, produce, and sell at contractually guaranteed

[1] *See also id.* at 372, n.60 (finding Pertamina to be "acting in bad faith by pursuing the annulment in Indonesia"); *id.* at 373 ("It is true that Pertamina is likely in the wrong here."); *id.* at 375 ("We empathize with the district court and share its frustrations at the acts of Pertamina and its counsel.").

prices electricity generated from geothermal sources in the Project area. *See* Pet. App. 4a, 57a.

The first contract, the Joint Operation Contract ("JOC") between KBC and Pertamina, granted KBC the right to develop resources in the Project area sufficient to supply a power plant of up to 400 megawatts of generating capacity; to deliver the electricity to Pertamina; and to receive payment from the state-owned electric utility, PT (PLN) Persero ("PLN"), for that electricity. *See* Pet. App. 4a, 57a. The second contract, the Energy Sales Contract ("ESC") among KBC, Pertamina, and PLN, in turn obligated PLN to purchase all of the electricity generated by KBC at guaranteed U.S. dollar-denominated prices. *See* Pet. App. 241a.

The contracts had virtually identical arbitration provisions. Both contracts required the parties to arbitrate any disputes in Geneva, Switzerland, pursuant to the Arbitral Rules of the United Nations Commission on International Trade Law (the "UNCITRAL Rules"). Pet. App. 4a, n.7. Both contracts required the parties to appoint arbitrators in the first instance: the JOC provided that "[e]ach party will appoint an arbitrator," and the ESC provided that "PLN on one hand, and [KBC] and PERTAMINA on the other hand, will each appoint one arbitrator." *Id.* Both contracts also provided that the two appointed arbitrators would "jointly appoint a third arbitrator within thirty (30) days of the date of the appointment of the second arbitrator, to act as Chairman of the Tribunal." *Id.* And both contracts granted the Secretary General of the International Center for Settlement of Investment Disputes ("ICSID") the authority to appoint an arbitrator in the event that an arbitration was commenced but a party failed to appoint an arbitrator within thirty days. *Id.*

The JOC and ESC were expressly incorporated into one another. The JOC provided that the ESC "shall be an integral part of this contract, and to the extent that provisions of the [ESC] obligate the parties hereto, shall be deemed incorporated into this contract for all purposes," while the ESC provided that it and the JOC constituted the entire agreement among the parties. Pet. App. 27a, n.58.

From 1994 through 1997, KBC fully performed its obligations under both agreements, investing approximately $93.1 million to explore, develop, and construct fields for the Project. Pet. App. 245a. By December 1997, KBC had drilled wells and developed geothermal fields in the Project area containing at least 210 megawatts of exploitable geothermal capacity. Pet. App. 204a.

The Dispute And Nomination Of Arbitrators. By Presidential Decree dated January 10, 1998, the Government of Indonesia indefinitely suspended the Project. Pet. App. 6a. Three and one-half months later, on April 30, 1998, KBC initiated arbitration against Pertamina, PLN, and the Government of Indonesia (together, the "Arbitration Respondents") claiming that the cancellation of the Project constituted a breach of both Project contracts. *Id.*; Pet. App. 218a. KBC's claim was based substantially on the fact that both contracts allocated to Pertamina and PLN the risk of a contractual default caused by a "Government Related Event," such as the Government's suspension of the Project. Pet. App. 218a, 8a.

In its notice of arbitration, KBC appointed Professor Piero Bernardini, vice-chair of the International Chamber of Commerce's International Court of Arbitration ("ICC") and member of the London Court of International Arbitration, to serve as an arbitrator. Pet. App. 6a. KBC served its

notice of arbitration on each of the Arbitration Respondents. Pet. App. 160a.

After the thirty-day period had elapsed without the appointment of an arbitrator by Pertamina or any other Arbitration Respondent – and without any communication whatsoever from any Arbitration Respondent regarding the notice of arbitration – KBC notified ICSID that Pertamina and the other Arbitration Respondents had failed to nominate an arbitrator. Pet. App. 30a-31a. That June 2, 1998 letter, as well as ICSID's letter confirming that it was received, was served on each Arbitration Respondent. Pet. App. 59a. Thereafter, KBC responded to questions from ICSID's legal adviser concerning the consolidation of disputes under the two contracts and the appointment of an arbitrator by KBC; that letter was again served on each Arbitration Respondent. Pet. App. 31a, 160a. On June 23, 1998, ICSID sent all of the foregoing correspondence to each Arbitration Respondent by fax and courier. Pet. App. 160a.

In a letter to all parties dated June 29, 1998, ICSID recounted the foregoing correspondence, noted the Arbitration Respondents' failure to respond, and requested the parties' comments by July 13, 1998, on the appointment of Dr. Ahmed El-Kosheri, another vice-chair of the ICC, as the second arbitrator. Pet. App. 31a. On July 1, 1998, KBC responded that it had no objection to such an appointment; that letter was also served on each Arbitration Respondent. Pet. App. 59a, n.4; 160a. The next day, ICSID confirmed receipt of KBC's letter, again copying the Arbitration Respondents. Pet. App. 59a, n.4. On July 10, 1998, ICSID again forwarded the foregoing correspondence to each Arbitration Respondent. *Id.*

On July 13, 1998, ICSID notified the Arbitration Respondents that it intended to appoint Dr. El-Kosheri as a member of the three-person tribunal. Pet. App. 31a. Pertamina and the other Arbitration Respondents again failed to respond, and on July 15, 1998, ICSID appointed Dr. El-Kosheri, who accepted the nomination. *Id.* On July 23, 1998, the two appointed arbitrators selected Mr. Yves Derains, former Secretary General of the ICC, as presiding arbitrator, and notified the parties of that nomination. *Id.*; Pet. App. 161a.

Pertamina has never argued in these confirmation proceedings that it failed to receive KBC's April 30, 1998 notice of arbitration or any of the letters regarding the appointment of the arbitrators.[2] Nonetheless, at no time during the two and one-half months following KBC's notice of arbitration did Pertamina respond to any of this correspondence, let alone raise any objection to the appointments of Professor Bernardini or Dr. El-Kosheri, or to their selection of Mr. Derains.[3] Pet. App. 31a, 59a-60a.

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[2] Pertamina attempts to attribute its initial failure to object to the appointment process to the alleged statements by a KBC employee in Indonesia, Robert McCutchen. *See* Pet. 9. Pertamina never raised this argument in the arbitration during its preliminary challenge to the manner in which the arbitrators were appointed, although it did attempt to rely on those statements during the later merits phase as an excuse for its breaches of contract. The tribunal rejected this argument as having "no relevance." Pet. App. 226a. Although Pertamina argued during the preliminary arbitration proceedings that it failed to name an arbitrator because it did not receive certain correspondence and because it had decided to contest the legitimacy of the arbitration itself, it did not make these arguments in the district court. *See* Pet. App. 33a, n.63; 72a, n.11.

[3] In fact, as noted by the district court, "Pertamina expressly informed the Tribunal [during the preliminary proceedings] . . . that it had no objection to Dr. El-Kosheri, the arbitrator appointed by the

(Continued on following page)

Pertamina omits from its petition any discussion of these extensive attempts by KBC and ICSID to notify Pertamina of the appointment proceedings and to seek its comments. Instead, Pertamina remarkably claims that the arbitrators were appointed "over Pertamina's timely and strenuous objection." Pet. 4.

The Preliminary Award Proceedings. Prior to the first procedural meeting in the arbitration, Pertamina and the other Arbitration Respondents, all represented by the same lawyers, finally appeared to request that the arbitrators consider certain preliminary procedural issues. In particular, they argued *inter alia* that the Government of Indonesia was not a proper party; that KBC's claims under the JOC and the ESC could not be consolidated into a single arbitration; and that the method by which the arbitrators were appointed violated the ESC. *See* Pet. App. 60a, 168a.

Following the submission of evidence, briefing and a hearing, the arbitrators agreed with the Arbitration Respondents that the Government of Indonesia was not a proper party,[4] but rejected each of the Arbitration Respondents' other preliminary challenges. *Id.*

With respect to the arbitrators' appointment, the tribunal held that the parties could not have intended that KBC and Pertamina jointly appoint a single arbitrator to adjudicate a dispute between them, Pet. App. at 194a-195a,

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ICSID. Thus, Pertamina's objection is solely to the fact that KBC was allowed to select one of the arbitrators." Pet. App. 72a, n.12 (citation omitted).

[4] Although the Government of Indonesia was dismissed as a party to the arbitration, it relies on its ownership of Pertamina as the basis for thereafter continuing to appear as an *amicus curiae* in this and related cases.

noting that this "would defy common sense." Pet. App. 195a. Instead, the arbitrators concluded that the parties did not expressly provide for such a situation, and left the appointment of arbitrators in such circumstances to be conducted under the UNCITRAL Rules, which authorized the appointment procedures used here.[5] Pet. App. at 194a-195a. The arbitrators also observed that the Arbitration Respondents had never claimed that they were declining to respond to the notice of arbitration because jointly nominating an arbitrator would violate the ESC, Pet. App. 196a, and that the decision did not create any unequal treatment for Pertamina because all three members of the tribunal were neutral arbitrators. Pet. App. 196a-197a.

Proceedings On The Merits. Over the next nine months, the remaining parties – KBC on the one hand, and Pertamina and PLN on the other – submitted documentary evidence, written witness statements, expert reports and substantial briefs on the merits of the dispute. *See* Pet. App. 208a-214a. During the five-day trial, which began on June 19, 2000, and ended on June 23, 2000, the tribunal heard live testimony from seven witnesses, as well as extensive argument by counsel on various liability and damages issues.[6] Pet. App. 214a. The parties submitted post-hearing briefs on August 7, 2000. Pet. App. 215a.

On December 18, 2000, the tribunal issued the Award, holding that Pertamina had breached the JOC and the

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[5] Pertamina has never contended that the appointment of the arbitrators was inconsistent with the UNCITRAL Rules.

[6] Both sides declined to cross-examine witnesses who had submitted written statements; notably, Pertamina and PLN declined to cross-examine KBC's damages expert, a professor at the Harvard Business School. *See* Pet. App. 247a, 214a.

ESC and that PLN had breached the ESC. Pet. App. 262a. The tribunal found that both contracts allocated to Pertamina and PLN the risk of a contractual loss caused by a "Government Related Event" such as the suspension of the Project by the Presidential Decree: the contracts placed "the consequences of a Governmental decision which prevents the performance of the contract at PERTAMINA's and PLN's sole risk." Pet. App. 225a. The tribunal awarded KBC $111.1 million – the amount KBC had actually expended on the Project plus interest – as well as $150 million in lost profits, explaining in detail how it arrived at that lost-profits award and the reasons it had rejected the substantially larger amount ($512.5 million) that KBC sought. Pet. App. 239a-247a, 253a-259a.[7]

Pertamina also suggests that lost profits should not have been awarded because the Project had made no progress, but the tribunal expressly rejected this argument in finding that KBC's investment of $93.1 million on

[7] Although it no longer challenges the award of lost profits, as it did unsuccessfully below, Pertamina implies that there was no evidentiary support for that decision. To the contrary, KBC presented substantial evidence supporting its lost-profits claim, including numerous fact witnesses, an expert on geothermal exploration and development, and a damages expert. *See* Pet. App. 247a-249a, 253a-259a. Pertamina also asserts that lost profits were awarded based on a Project "for which no financing was ever committed," Pet. 25, but neglects to mention that the arbitrators expressly rejected this contention, finding that: "[r]egarding the financing necessary for the Project development, there is no reason in the Arbitral Tribunal's opinion to cast doubts about the Claimant's readiness, directly and/or through its shareholders to make provision thereof." Pet. App. 257a. As the Fifth Circuit explained, "the Tribunal appears to have given all of the evidence as to damages, including the availability of financing, appropriate weight in determining liability and damages . . . testimony about FPL's willingness to provide financing was only one factor relevant to damages." Pet. App. 40a.

the Project were "proven and uncontested expenditures." Pet. App. 245a. With respect to the available capacity on which KBC's lost-profits claim was based, the tribunal found that the Arbitration Respondents' arguments "appear[ed] unjustified" – although the tribunal did calculate KBC's lost profits based on a smaller projection of available capacity. Pet. App. 257a.

In reaching its decision, the tribunal cited two other arbitral awards regarding power projects indefinitely suspended by the January 10, 1998, Presidential Decree. Pet. App. 243a, 253a. In both of those cases (the "*Himpurna*" and "*Patuha Power*" cases) an international arbitral tribunal unanimously held that PLN had breached an Energy Sales Contract identical in all relevant respects to the ESC among KBC, Pertamina and PLN, and awarded the claimants $391,711,652 and $180,570,322, respectively.[8] *See* Pet. App. 253a-254a; Mark Kantor, *International Project Finance and Arbitration with Public Sector Entities: When is Arbitrability a Fiction?*, 24 Fordham Int'l L.J. 1122 (2001) (discussing the *Himpurna* and *Patuha Power* awards).[9]

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[8] Without referencing the substantial size of those awards, Pertamina argues that they establish that the Award in this case is "grossly inequitable – like stepping on the shoulders of a drowning man." Pet. 25. As the district court noted, however, Pertamina's "reliance on *Himpurna* and *Patuha* is also somewhat disingenuous given its argument to the Tribunal that those decisions should not be treated as precedents." Pet. App. 87a, 214a. In fact, Pertamina argued that those awards should not even have been submitted to the tribunal for consideration. Pet. App. 214a.

[9] The *Patuha Power* arbitration was one of the Government of Indonesia's most egregious efforts to thwart an international arbitration. In that case, the Government of Indonesia procured an injunction in Indonesia against further arbitration proceedings, and when the

(Continued on following page)

The Confirmation Proceedings. Once an international arbitration award has been issued, the New York Convention recognizes two types of actions: (1) an action brought in the country that was the situs of the arbitration (here, Switzerland) to *set aside* the award; and (2) an action brought in any jurisdiction to *confirm and enforce* the award and obtain a judgment. Whereas in the first type of action a party can raise various challenges to the award, in an action to *confirm* the award there are only seven limited circumstances in which confirmation can be denied. *See* 9 U.S.C. § 207; Pet. App. 15a. Moreover, the party opposing confirmation bears the burden of proof of establishing that one of those limited exceptions applies. Pet. App. 15a; *In re Arbitration Between Trans Chem. Ltd. and China Nat'l Mach. Import & Export Corp.*, 978 F. Supp. 266, 309 (S.D. Tex. 1997); *In re Arbitration Between Chromalloy Aeroservices and Arab Repub. of Egypt*, 939 F. Supp. 907, 909 (D.D.C. 1996).

On February 21, 2001, KBC filed suit in the Southern District of Texas to confirm and enforce the Award and to enter a final judgment consistent with it. Pertamina challenged enforcement on just four grounds: (1) the tribunal had improperly consolidated KBC's claims under the ESC and JOC into one arbitration; (2) the arbitrators were not appointed in a manner consistent with the ESC; (3) Pertamina was "unable to present its case" to the tribunal; and (4) enforcement of the damages award would violate the public policy of the United States. Pet. App. 66a-67a.[10]

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arbitration nonetheless continued, forcibly kidnapped and detained the arbitrator it had appointed. 15 Mealey's Int'l Arb. Rep. B-1, B-3 (2000); R. 4294.

[10] Pertamina did not dispute personal jurisdiction in the Southern District of Texas. KBC voluntarily dismissed PLN. Pet. App. 57a, n.1.

Following cross-motions for summary judgment and based on a full record, on December 4, 2001, the district court granted summary judgment to KBC and confirmed the Award, rejecting each of Pertamina's grounds for opposing confirmation.[11] With respect to the sole issue now raised by Pertamina – the propriety of the arbitrators' appointment – the district court first stated that if the arbitral tribunal's decision on that issue were "an arbitrable one," *i.e.*, a decision entitled to deference, there was "no reason under the New York Convention to reject the Tribunal's reasoned analysis of the ESC." Pet. App. 72a.

The district court also considered the appointment issue *de novo*, however, and held that "Pertamina has not established a violation of the ESC in regard to the first (or any other) arbitrator's selection." *Id.* In particular, the district court held that "Pertamina's construction of the selection procedure renders the ESC's arbitration provision illusory" because "Pertamina would hold the unilateral power to prevent the arbitration of disputes between it and KBC arising under the ESC simply by refusing to select or comment on KBC's proposals for an arbitrator." Pet. App. 73a. According to the district court, "[t]hat is not a reasonable interpretation of the expressed intent of the parties as set forth in the ESC." *Id.*

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[11] Prior to the district court's ruling, Pertamina and PLN sought to set aside the Award in Switzerland, the situs of the arbitration. Pertamina and PLN failed to meet the jurisdictional deadline for payment of costs in Switzerland, however, and on April 24, 2001, the Swiss Supreme Court dismissed their appeal for failure to make timely payment. Pet. App. 9a. In August 2001, the Swiss Supreme Court denied their motion for reconsideration. *Id.*

In its *de novo* analysis, the district court agreed with the tribunal's construction of the ESC, but also noted that there are "other viable interpretations of the ESC arbitration clause and the parties' contracts generally that support the procedure used in this dispute." Pet. App. 73a, n.14. As the district court recognized, "because the ESC and JOC are expressly integrated contracts, they must be interpreted together to determine the intent of the parties," and thus the parties may have "intended to be bound by the arbitration provision (including the provision for the selection of arbitrators) *of the JOC when a dispute involved that contract.*" *Id.* (emphasis added). As a result, "the arbitration provision of the ESC would be operative only in the event the arbitration did not include issues arising under the JOC," or the "ESC methodology [might apply] only when KBC and Pertamina both were adverse to PLN and not to each other." *Id.*

As an alternative basis for rejecting Pertamina's arguments on this issue, the district court held that because of the "clear 'pro-enforcement bias' of the New York Convention," Pet. App. 67a (quoting *Compagnie Des Bauxites De Guinee v. Hammermills, Inc.*, No. 90-0169, 1992 WL 122712, *5 (D.D.C. May 29, 1992)), Pertamina had to prove that any violation of the appointment procedures in the ESC had "actually caused Pertamina substantial prejudice in the arbitration." Pet. App. 67a. As the district court held, Pertamina could not make this showing: "there is no evidence – and Pertamina does not even allege – that Prof. Bernardini, the KBC-selected arbitrator, was biased against Pertamina"; "[a]ll the findings and awards were unanimous"; and there "is no evidence or even any allegation that the other two arbitrators were not neutral, were biased, or had any conflict of interest." Pet. App. 74a.

As a final ground for rejecting Pertamina's challenge to the appointment procedures, the district court held that Pertamina's failure to respond to the notice of arbitration or to ICSID's requests for comments on the nomination procedures made the appointment proper:

> The time for Pertamina to object to KBC's selection or for Pertamina to have asserted its right to participate in the first arbitrator's appointment was within thirty days of receiving KBC's Notice of Arbitration and arbitrator selection. *In the absence of an objection from Pertamina, nothing in the ESC precluded the ICSID from accepting KBC's nomination for the first arbitrator. This procedure materially complies with the terms of the ESC.* Pertamina's belated arguments that Prof. Bernardini was improperly selected are a futile attempt to avoid consequences of its strategic decisions not to object timely to KBC's selection and to decline to participate in the selection of an arbitrator.

Pet. App. 73a-74a (emphasis added).

Having failed in its effort to annul the Award in Switzerland (and notwithstanding its prior claims that Switzerland was the situs of the arbitration), following the district court's grant of summary judgment to KBC, Pertamina filed suit in Indonesia seeking annulment of the Award. Pet. App. 10a. An Indonesian court immediately granted an injunction against enforcement of the Award, and in August 2002 annulled the Award. *Id.* In December 2002, Pertamina filed a Fed. R. Civ. P. 60(b) motion in the district court to vacate the summary judgment on three grounds: (1) the Indonesian court's annulment of the Award; (2) newly discovered evidence that KBC's investors held a political risk insurance policy; and

(3) satisfaction of judgment to the extent of a $75 million payment from the insurers. *Id.* Pertamina also filed a motion in the Fifth Circuit to supplement the appellate record and for additional briefing. Pet. App. 92a-93a.

The Fifth Circuit denied Pertamina's motion to supplement the appellate record, and remanded to the district court for consideration of Pertamina's Rule 60(b) motion. *Id.* On remand, the district court denied the motion, holding that the Indonesian Court was not a proper forum in which to set aside the award, Pet. App. 121a; that Pertamina had failed to show that KBC had in any way misled the arbitrators or that KBC's failure to produce the political risk insurance policy violated the rules governing the arbitration, Pet. App. 124a; and that Pertamina was not entitled to set off from the judgment the amount of the insurance payment, Pet. App. 141a. Pertamina appealed that decision, which was consolidated with Pertamina's appeal from the grant of summary judgment to KBC. Pet. App. 3a.

During this period, KBC pursued other confirmation and enforcement proceedings. In March 2003, the High Court of the Hong Kong Special Administrative Region Court of First Instance also confirmed the Award, rejecting the same arguments Pertamina makes here (and the other arguments it made in the courts below) for substantially the same reasons as those articulated by the district court and Fifth Circuit. *See Karaha Bodas Co.*, 335 F.3d at 363; Pet. App. 21a, n.37; 23a; R. 6418; TSR. 6385.[12]

[12] Citations to "R." are to the original Record on appeal in the Fifth Circuit; "TSR." citations are to the Third Supplemental Record on appeal in the Fifth Circuit.

The Fifth Circuit's Decision. The Fifth Circuit affirmed each of the district court's decisions on the issues raised by Pertamina before and after the remand. Pet. App. 3a. Pertamina challenges only one of those holdings here.[13]

With respect to Pertamina's argument regarding the appointment of the arbitrators, the Fifth Circuit did not – as Pertamina contends – defer to the arbitrators (or even to the district court) regarding the propriety of the arbitrators' appointment. Instead, the Fifth Circuit itself interpreted *de novo* the terms of the parties' agreements and rejected Pertamina's arguments:

> If the ESC required KBC and Pertamina jointly to select an arbitrator for disputes in which KBC and Pertamina were opposed, as Pertamina contends, *Pertamina could effectively block arbitration under the ESC simply by refusing to agree*

[13] Although Pertamina does not seek certiorari from the Fifth Circuit's decision on any other issue, Pertamina does state as fact certain contentions that were rejected below. For example, Pertamina states that "only six weeks before the scheduled final hearing, KBC changed its case dramatically," Pet. 12, but the district court found that "[i]n fact, KBC's Rebuttal did not assert any new claims or new legal theories for recovery," Pet. App. 76a, and the Fifth Circuit found that Pertamina's argument was meritless and had been waived. Pet. App. 36a-39a.

Pertamina similarly contends that during the arbitration proceedings, "[u]nbeknownst to Pertamina and PLN, and undisclosed by KBC and its witnesses . . . FPL [a part owner of KBC] was party to a political risk insurance policy." Pet. 12. During the arbitration, however, Pertamina presented evidence from its own witnesses that it was told that KBC initiated arbitration "to claim [for] the insurance company." R. 1031-30, 1390; TSR. 6375. As the Fifth Circuit found, during the arbitration KBC did not produce a copy of the insurance policy owned by some of its investors because of "Pertamina's decisions not to pursue the subject." Pet. App. 50a.

> *with KBC to the selection of an arbitrator. Such an interpretation would make the ESC arbitration clause illusory.*

Pet. App. 32a-33a (emphasis added). Only after concluding that the arbitrators' appointment was consistent with the ESC did the Fifth Circuit note, in a separate paragraph, that the arbitral tribunal had "reasonably interpreted the ESC's arbitration provisions and reasonably applied the UNCITRAL arbitration rules." Pet. App. 33a. At no place in its discussion of this issue did the Fifth Circuit suggest, let alone expressly state, that it was deferring to the arbitral tribunal's decision. The Fifth Circuit *agreed* with the tribunal, but never indicated it was deferring to it.[14]

Like the district court, the Fifth Circuit also found it noteworthy that Pertamina had failed to object to KBC's selection of an arbitrator, to nominate its own arbitrator, or to challenge the arbitrators' appointment until after the entire panel had been selected and seated. The Fifth Circuit held that these actions constituted a "strategic decision that Pertamina should not now be able to assert as a defense to enforcing the Award." Pet. App. 33a.

Pertamina did not petition the panel for rehearing or seek rehearing *en banc*.

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[14] Notably, Pertamina never argued to the Fifth Circuit that it could not defer to the arbitrators' decision on the appointment issue, nor did it cite any of the four appellate decisions that it now argues are in conflict with the Fifth Circuit's decision.

REASONS FOR DENYING THE WRIT

In the opinion below, the Fifth Circuit properly concluded that the arbitrators were appointed in a manner wholly consistent with the arbitration provision of the ESC. That correct interpretation of the parties' contracts and the manner in which the arbitrators were appointed does not present a question warranting this Court's review. Pertamina should not be permitted to avoid its contractual obligations by raising meritless procedural challenges to a properly conducted international arbitration. *Cf. Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 517 (1974) (holding that the "parochial refusal by the courts of one country" to enforce an arbitration agreement or award "would invite unseemly and mutually destructive jockeying" that "would surely damage the fabric of international commerce and trade. . . .").

I. BECAUSE THE FIFTH CIRCUIT DID NOT DEFER TO THE ARBITRATORS REGARDING THE PROPRIETY OF THEIR APPOINTMENT, THE RULING BELOW DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT.

Pertamina's sole argument in support of its petition is that the decision below creates a conflict between the Fifth Circuit and four other courts of appeals on the issue of whether courts may defer to arbitrators when arbitrators have resolved questions regarding the appropriateness of their own appointment. This argument depends entirely on Pertamina's contention that the Fifth Circuit actually deferred to the arbitrators on that issue here. A plain reading of the opinion below, however, demonstrates that the Fifth Circuit did *not* defer to the arbitrators, but

instead conducted its own analysis of the parties' agreements and the facts of this case.

In particular, after recounting the relevant facts regarding the arbitrators' appointment, the Fifth Circuit rejected Pertamina's arguments regarding the arbitration provision of the ESC, holding that if the "ESC required KBC and Pertamina jointly to select an arbitrator for disputes in which KBC and Pertamina were opposed, as Pertamina contends, Pertamina could effectively block arbitration under the ESC simply by refusing to agree with KBC to the selection of an arbitrator." Pet. App. 32a-33a. Such an interpretation, the Fifth Circuit held, "would make the ESC arbitration clause illusory." *Id.* at 33a. Accordingly, the Fifth Circuit concluded, "Pertamina has failed to meet its burden of showing that the Tribunal was improperly constituted." *Id.*

Pertamina nevertheless argues that the Fifth Circuit deferred to the arbitrators when the Fifth Circuit stated that the arbitrators had "reasonably interpreted the ESC's arbitration provisions and reasonably applied the UNCITRAL arbitration rules." Pet. App. 33a. But that single sentence follows the Fifth Circuit's analysis of the facts and the arbitration provisions in the parties' agreements, and thus reflects nothing more than the Fifth Circuit's view that the arbitrators had correctly decided the issue.

Although the Fifth Circuit held that the tribunal had reached the correct conclusion, nowhere did the Fifth Circuit suggest, let alone expressly state, that it was deferring to the arbitrators on this issue.[15] More importantly, nowhere did the

[15] Even Pertamina does not contend that the Fifth Circuit expressly stated it was deferring to the arbitrators decision. *See* Pet. 14

(Continued on following page)

Fifth Circuit even suggest that it would have decided the issue differently than the arbitrators if it had been able to consider the issue *de novo*. *Compare SEC v. Sargent*, 329 F.3d 34, 41 (1st Cir. 2003) ("Although we may disagree with the district court as to which way the equities tip, our hands are tied by the standard of review.").

II. EVEN IF THE FIFTH CIRCUIT HAD DEFERRED TO THE ARBITRATORS, THIS CASE WOULD NOT PRESENT A CIRCUIT CONFLICT WARRANTING THIS COURT'S REVIEW.

A. All Of The Decisions On Which Pertamina Relies Predate This Court's Decision In *Green Tree Financial*.

In attempting to claim that a circuit conflict exists, Pertamina cites to four court of appeals decisions. Each decision, however, predates this Court's recent opinion in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), which held that courts must defer to arbitrators on matters of arbitration procedures and scope unless those issues are so-called "gateway matters." *Id.* at 452. In the year since *Green Tree Financial* was decided, no court of appeals has interpreted *Green Tree Financial* to decide whether the manner in which arbitrators are appointed constitutes such a "gateway" matter. Thus no court has held that the manner in which arbitrators are appointed is

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(noting that the "court of appeals did not articulate any particular standard of review. . . .").

a "gateway" matter, or that judicial deference to an arbitrator's resolution of that issue is inappropriate.

In *First Options v. Kaplan*, 514 U.S. 938 (1995), this Court held that ordinarily the question of whether the parties had agreed to arbitrate their dispute was an issue that should be decided by a court in the first instance, unless the parties had agreed to submit *that* issue (*i.e.*, the question of whether they had agreed to arbitrate their dispute) to arbitration. *See id.* at 943 ("[A] court must defer to an arbitrator's arbitrability decision when the parties submitted that matter to arbitration."). Eight years later, in *Green Tree Financial*, the question was whether that general rule also applied to conducting an arbitration as a class action. 539 U.S. at 452. Conducting a *de novo* review, the South Carolina Supreme Court had held that the parties' contracts did not permit the arbitral tribunal to conduct a class action. This Court reversed, stating that the issue should have been left to the arbitrators to decide:

> Arbitrators are well situated to answer that question. Given these considerations, along with the arbitration contracts' sweeping language concerning the scope of the questions committed to arbitration, this matter of contract interpretation should be for the arbitrator, not the courts, to decide.

Id. at 453. This Court concluded that "if there is doubt about [who should 'answer the relevant question'] . . . we should resolve that doubt 'in favor of arbitration.'" *Id.* at 452 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985)).

In reaching this decision, this Court held that there are only "limited circumstances" in which a court should

not defer to an arbitral tribunal's resolution of an issue. *Green Tree Financial*, 539 U.S. at 452. The Court gave two examples of such "gateway" issues: whether there is a valid arbitration agreement between the parties or whether a binding arbitration clause applies to a particular dispute. *Id.* Other issues, including "what *kind of arbitration proceeding* the parties agreed to" and issues "concern[ing] contract interpretation and arbitration procedures," can and should be left to arbitrators to decide. *Id.* (emphasis in original).

By requiring courts to analyze arbitration procedures *de novo* only when they involve "gateway" issues, *Green Tree Financial* suggests that deference should be given to arbitrators when they interpret the parties' agreements in deciding challenges to their appointment, particularly where the parties have committed the resolution of that issue to arbitration. That is precisely what occurred here: the arbitrators interpreted the parties' agreements. Moreover, those agreements incorporated the UNCITRAL Rules, as a result of which "the parties agreed to abide by a system in which the tribunal rules on objections to its jurisdiction and the arbitrator, rather than the district court, should decide whether the parties' disputes are arbitrable." *Wal-Mart Stores, Inc. v. PT Multipolar Corp.*, 1999 U.S. App. LEXIS 31578, *6 (9th Cir. Nov. 30, 1999).[16]

[16] Article 21(1) of the UNCITRAL Rules states that "[t]he arbitral tribunal shall have the power to rule on objections that it has no jurisdiction." (http://www.uncitral.org/en-index.htm). Indeed, because the parties expressly incorporated the UNCITRAL Rules into their agreements, even if the petition properly presented the question of whether the propriety of the arbitrators' appointment was a "gateway" issue, under *First Options* the parties agreed to submit that issue to the arbitrators to decide in the first instance.

Because each case on which Pertamina relies predates *Green Tree Financial*, however, none of those decisions had occasion to consider whether the propriety of an arbitrator's appointment is a "gateway matter" that, under *Green Tree Financial*, must be decided by the courts. KBC is not aware of any court of appeals that has addressed this question in light of *Green Tree Financial*, and this Court should await further development of the law in light of *Green Tree Financial*. *See Brown v. Texas*, 522 U.S. 940, 943 (1997) (denying certiorari because "the likelihood that the issue will be resolved correctly may increase if this Court allows other tribunals 'to serve as laboratories in which the issue receives further study before it is addressed by this Court.'") (citation omitted).

Finally, even if the Fifth Circuit had deferred to the arbitrators on the appointment issue (it did not), only one circuit court had expressly held prior to *Green Tree Financial* that courts cannot defer to arbitrators on the issue of their appointment. *See Cargill Rice, Inc. v. Empresa Nicaraguense Dealimentos Basicos*, 25 F.3d 223 (4th Cir. 1994).[17] In each of the other three cases on which Pertamina relies in claiming that a circuit conflict exists on this issue, the court of appeals simply interpreted the

[17] In *Cargill*, the parties' agreement stipulated that in the event of a dispute, it would be resolved by arbitrators "chosen by mutual agreement," 25 F.3d at 224, and provided that the arbitration could proceed either in Nicaragua or the Rice Millers' Association of the United States ("RMA"), an industry-specific arbitration committee. When the arbitration commenced, the RMA appointed an arbitral committee instead of allowing the parties to do so, as specifically provided by their contract. The Fourth Circuit overturned the award because the parties' contract "expressly required" the arbitrators to be chosen only by the parties. *Id.* Unlike the contracts here, the *Cargill* agreements did not adopt the UNCITRAL Rules.

contracts at issue and did not expressly address whether deference was appropriate. *See Hugs & Kisses, Inc. v. Aguirre*, 220 F.3d 890, 893 (8th Cir. 2000) (no discussion of deference or standard of review in court's reversal of an award against a party that failed to select an arbitrator and refused to participate in the arbitration); *Szuts v. Dean Witter Reynolds, Inc.*, 931 F.2d 830, 831 (11th Cir. 1991) (no discussion of deference or standard of review in court's reversal of an award made by two arbitrators following the disqualification and removal of the third arbitrator where the parties' arbitration agreement expressly provided that no award would be made by less than three arbitrators); *Avis Rent A Car Sys., Inc. v. Garage Employees Union*, 791 F.2d 22, 25 (2d Cir. 1986) (no discussion of deference or standard of review in court's reversal of an award where an arbitrator appointed pursuant to one collective bargaining agreement between the parties determined that a second agreement between the parties applied and proceeded to consider issues under the second agreement).

B. All Of The Decisions On Which Pertamina Relies Involved Domestic Arbitrations To Which The New York Convention Does Not Apply.

There is an additional reason that this case would not present a circuit conflict even if the Fifth Circuit had deferred to the arbitrators on the appointment issue. Unlike the Federal Arbitration Act, the New York Convention – which applies to international arbitrations but not domestic arbitrations – has a specific provision, Article V(1)(d), that addresses whether the confirmation and

enforcement of an international award should be rejected because of the manner in which arbitrators are appointed. *See* 9 U.S.C. § 201, Art. V(1)(d) (recognition and enforcement of an award may be refused only if a party establishes that the "composition of the arbitral authority . . . was not in accordance with the agreement of the parties").

Each of the four cases on which Pertamina relies for its claimed split, however, involved domestic arbitrations, which are not governed by the New York Convention. *See Cargill*, 25 F.3d at 223 (domestic arbitration); *Hugs & Kisses,* 220 F.3d at 890 (same); *Szuts,* 931 F.2d at 830 (same); *Avis Rent A Car Sys.,* 791 F.2d at 22 (same). As a result, none of those cases interpreted Article V(1)(d) to decide whether, in applying it, a court can defer to an international arbitral tribunal's discussion regarding the propriety of the manner in which the arbitrators were appointed – and KBC is not aware of any decision addressing that issue.

Because this is a New York Convention case, prior to this petition, Pertamina had never relied on those four domestic arbitration cases in arguing that in a confirmation proceeding under the New York Convention, a court could not defer to arbitrators on the propriety of their own appointment. In fact, Pertamina never argued to the Fifth Circuit that it could not defer to the arbitrators' decision on the appointment issue, nor did Pertamina cite any of the four court decisions that it now argues are in conflict with the Fifth Circuit decision. Pertamina also never filed an action in any court prior to or during the arbitration to dispute how the arbitrators had been appointed, and instead agreed to have that issue submitted to the arbitrators for their resolution. *See supra* at 9-10.

III. EVEN IF THE DECISION BELOW CONFLICTED WITH A COURT OF APPEALS DECISION AFTER *GREEN TREE FINANCIAL*, THIS WOULD NOT BE AN APPROPRIATE CASE IN WHICH TO RESOLVE THAT CONFLICT.

For the foregoing reasons, the Fifth Circuit's decision does not conflict with the decision of any other court of appeals. But even if there were such a conflict, there are several reasons why this would not be an appropriate case in which to resolve it.

First, the Fifth Circuit's decision on the appointment issue does not rest solely on the court's determination that the arbitrators were appointed in a manner consistent with the ESC. Instead, the Fifth Circuit (like the district court) held in the alternative that Pertamina had waived any right to challenge the propriety of the arbitrators' appointment because Pertamina had failed to object to KBC's selection of an arbitrator, had failed to nominate its own arbitrator, and had failed to challenge the arbitrators' appointment until after the entire panel had been selected and seated. Pet. App. 33a-34a.

Pertamina argues that this alternative holding was "illogical" and incorrect because "no strategic advantage could be gained by failing to take the opportunity to appoint one's own arbitrator if in fact it existed." Pet. 22. But of course that is precisely what *PLN* did: after receiving KBC's notice of arbitration, PLN – which on Pertamina's theory had the right to appoint its own arbitrator – did not object or nominate its own arbitrator. Because nominating an arbitrator is akin to making an appearance, each Arbitration Respondent likely made the strategic decision that if it declined entirely to nominate an arbitrator (or otherwise acknowledge the notice of arbitration), the

arbitration might never get started, or when the arbitration commenced, the Arbitration Respondents could then raise the procedural objection on which Pertamina now relies. In any event, Pertamina does not seriously contend that this fact-specific holding presents an issue that warrants this Court's review, nor does it point to any circuit conflict on this issue.

Second, the district court held as another alternative basis for rejecting Pertamina's challenge to the arbitrators' appointment that Pertamina had failed to prove that any violation of the ESC in the arbitrators' appointment had "actually caused Pertamina substantial prejudice in the arbitration." Pet. App. 67a (citing *Compagnie Des Bauxites*, 1992 WL 122712 at *5). Although the Fifth Circuit did not reach the prejudice issue, the district court's judgment provides yet another ground supporting the decisions below – as does the district court's determination that several alternative interpretations of the parties' agreements supported the manner in which the arbitrators were appointed. *See supra* at 15.

Finally, resolution of the question presented in Pertamina's favor would not affect the outcome of this case or Pertamina's liability to KBC. The petition is based entirely on the argument that the arbitrators' appointment violated the *ESC*; Pertamina has never argued, in this Court or elsewhere, that the appointment of the arbitrators was inconsistent with the *JOC*. The Award, however, held Pertamina liable to KBC for breaching *both contracts*. Pet. App. 232a.[18] As a result, even if Pertamina were to prevail

[18] Although Pertamina argued below that it was improper to consolidate KBC's claims under the JOC and the ESC into a single arbitration, *see* Pet. App. 26a-27a, it no longer presses that argument.

(Continued on following page)

on its claim that the arbitrators' appointment violated the *ESC*, Pertamina would still be liable to KBC for its breach of the *JOC*. Thus any decision in Pertamina's favor on the appointment issue would be an advisory opinion, exceeding this Court's jurisdiction.[19]

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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The arbitrators, the district court, and the Fifth Circuit all rejected this contention, *see* Pet. App. 189a, 69a, 29a, and Pertamina has not presented that issue for review.

[19] This Court "reviews judgments, not statements in opinions," *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956), and does not ordinarily "decide questions that cannot affect the rights of litigants in the case before" it. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)).

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IN THE

Supreme Court of the United States

PT PERTAMINA (PERSERO), F/K/A PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA,
Petitioner,

v.

KARAHA BODAS COMPANY, L.L.C.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF

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Petitioner PT Pertamina (Persero), f/k/a Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina"), respectfully submits this reply in further support of its Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit ("Pet."), and in response to the Brief for Respondent in Opposition to Petition for Writ of Certiorari ("Opp.") served by Karaha Bodas Company, L.L.C. ("KBC") on August 6, 2004.

ARGUMENT

Article V(1)(d) of the New York Convention protects against enforcement of an international arbitration award when "[t]he composition of the arbitral authority . . . was not in accordance with the agreement of the parties." The New York Convention is implemented via Chapter 2 and, except where inconsistent, Chapter 1 of the Federal Arbitration Act ("FAA"). The international arbitral tribunal here was not selected in accordance with the plain terms of the parties' arbitration agreements. Nevertheless, applying a deferential standard of review, the court below allowed the resulting award to stand.

In its petition, Pertamina showed this decision conflicts with well-established law under the FAA in four other circuits that contractual methods for selection of arbitrators must be strictly enforced and that an arbitrator's construction of such contractual provisions is not entitled to deference from the courts. This conflict concerns a recurring and important issue that cuts to the core of arbitration—its dependency on and limitation by the consent of the parties. The Opposition does not undermine these contentions and instead highlights the propriety of granting the petition in this case.

First, there is an actual conflict. The court of appeals' parroting of the arbitrators' analysis, on which Respondent relies, does not constitute independent evaluation of the arbitration clauses, and the court's enforcement of the contrived method of selection used in this case conflicts with the strict conformity demanded by the majority rule. *See Avis Rent A*

Car Sys., Inc. v. Garage Employees Union, 791 F.2d 22, 25 (2d Cir. 1986) ("Courts generally enforce [arbitration clauses] strictly, vacating awards entered by arbitrators whose qualifications or method of appointment fail to conform to arbitration clauses.").

Second, nothing in this Court's *Green Tree* decision undermines the strength of the decisions from the other circuits. To the contrary, the issue presented here—who gets to decide whether the arbitrators were properly appointed—is much like the gateway question held to be for the courts, not the arbitrators, in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1995). It concerns fundamentally ***who*** will decide the parties' dispute, and, unlike the class action question in *Green Tree*, not merely "***what kind of arbitration proceeding*** the parties agreed to." *Green Tree Financial Corp. v. Bazzle,* 539 U.S. 444, 452 (2003) (emphasis in original). That the case also involves the New York Convention provides an additional reason to grant the petition, not deny it. The law under Chapter 1 of the FAA is fully consonant with the New York Convention's stricture to decline enforcement of an award issued by arbitrators not selected in accordance with the parties' agreement. Uniformity and consistency are important. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 (1974).

Third, if the arbitrators were not properly selected, as we contend, then the award should not be enforced, as specified in Article V(1)(d) of the New York Convention. Respondent's contrary contentions are makeweights that are readily discarded.

1. Respondent cites no authority—not under the New York Convention nor under the FAA—for courts to defer to arbitrators' determinations of the propriety of their selection or for anything other than rigorous enforcement of arbitrator selection clauses. Rather, both *Cargill* and *Avis* are explicit that no deference is due the arbitrator's own interpretation of the selection clause and that strict adherence is required. *Cargill Rice, Inc. v. Empresa Nicaraguense Dealimentos Basicos*, 25

F.3d 223, 226 (4th Cir. 1994) (arbitrators' "interpretation would not be entitled to deference"; deference "appears impossible because the determination of how they should be selected obviously had to precede their selection"); *Avis*, 791 F.2d at 25 (courts should "generally enforce [arbitration clauses] strictly"; "arbitrator had no authority to interpret"). *See also Szuts v. Dean Witter Reynolds, Inc.*, 931 F.2d 830, 831 (11th Cir. 1991) (rejecting decision of two arbitrators following removal of third when agreement required the arbitration to "'be before at least three arbitrators'"); *Hugs & Kisses, Inc. v. Aguirre*, 220 F.3d 890, 893 (8th Cir. 2000) (when agreement required parties to negotiate selection in good faith, court rejected award made by arbitrator selected by one party when other party ceased participation; remedy is selection by court, not unilateral selection by one party).

Respondent acknowledges, as it must, that there is such precedent. It does not dispute that both the arbitral tribunal and the court below acknowledged that the ESC by its terms required that KBC and Pertamina jointly appoint an arbitrator, Pet. App. 32a, 194a-195a, yet they required instead that Pertamina and PLN (and the Government) make a joint appointment.[1] Respondent nonetheless contends that there is no conflict, however, because either (a) the court of appeals did not articulate the standard of review pursuant to which it was operating, or (b) the court of appeals actually engaged in a *de novo* review of the arbitrator selection clauses. Opp. at 20-22. Neither proposition is tenable.

At the outset, Respondent short-quotes the Petition in asserting that we agreed that the Fifth Circuit did not suggest

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[1] That the Government was later dismissed as a party does not negate the fact that when KBC initiated the arbitration it purported to require Pertamina to appoint one arbitrator jointly with PLN and the Government, and that the ICSID Secretary General made such an appointment for them. Neither the arbitrators nor the courts below ever tried to explain how such a ***triple*** joint-appointment satisfied any of the parties' agreements. *See* Pet. App. 193a (disregarding role of Government since it had been dismissed).

that it was deferring to the arbitrators. Opp. at 21 & n.15. The point made by the remainder of the quoted sentence is that the court did not adopt a distinct *de novo* standard "***for its assessment of the propriety of the selection of arbitrators*** under Article V(1)(d) of the Convention," Pet. at 14 (emphasis added), as it should have. Rather, the court applied the highly deferential standard it applied to review of ***all*** of the award: "The court may not refuse to enforce an arbitral award solely on the ground that the arbitrator may have made a mistake of law or fact. 'Absent extraordinary circumstances, a confirming court is not to reconsider an arbitrator's findings.'" Pet. App. 15a. Because the Fifth Circuit applied this deferential standard, and not the strict *de novo* review required under the case law of the Second, Fourth, Eighth, and Eleventh Circuits, there is a clear conflict.

Further, what Respondent contends was *de novo* review was simply a regurgitation of the tribunal's interpretation of the arbitration clauses, capped by the court's conclusion that the tribunal's interpretation was "reasonabl[e]." Pet. App. 32a-33a. The one example of supposed independent review Respondent stresses, Opp. at 18-19, 21, demonstrates how far off course the Fifth Circuit strayed in deferring to the arbitrators. The court's conclusion that strict application of the arbitration clause would allow Pertamina to block arbitration flies in the face of the express terms of the contract, as explained in the Petition at 14, 21, and not contested by Respondent—KBC could have asked the ICSID Secretary General to make a joint appointment for itself and Pertamina, as the ESC required, rather than foisting a joint appointment on Pertamina, PLN, and the Government. By deferring to the arbitrators and failing to require strict adherence to the agreed methods for selection of the arbitrators, the court below created a conflict with the four other courts of appeals.

2. Respondent's arguments based on *Green Tree* are spurious. The court below, of course, decided this case after *Green Tree* was decided, and after Respondent relied on it, but the court did not rest its decision on or even cite the case. Conversely, there is nothing in *Green Tree* that should cause the four circuits that have demanded *de novo* review and strict application of arbitrator selection clauses to change their views. As explained in the Petition and not addressed in the Opposition, there are powerful reasons to conclude that arbitrator selection is precisely the sort of gateway issue that should be decided by the courts, not arbitrators: (a) whether the arbitrators were properly appointed necessarily is a question antecedent to their authority to act, and therefore there is no basis to defer to their interpretation; (b) Article V(1)(d) of the New York Convention specifically leaves it to the reviewing court to determine whether the arbitrators were appointed in accordance with the contract; and (c) leaving it to the arbitrators to determine the propriety of their appointment risks allowing the decision to be compromised, even unintentionally, by the arbitrators' self-interest, more so than virtually any other gateway issue. *See* Pet. at 18-20. The arbitrator selection question concerns quite literally ***who*** will decide the case, not simply what kind of proceedings will be conducted, *see Green Tree*, 539 U.S. at 452, and thus is one that the parties' must be expected to have understood the courts would ultimately decide, within the framework established by this Court. *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002); *First Options*, 514 U.S. at 944-45. That the court below deviated from the other circuits whose precedent conforms to this teaching, even after *Green Tree*, provides no basis to conclude that *Green Tree* will lead to resolution of the conflict—quite the contrary.

The Opposition notes that the cases from the other circuits with which the ruling below conflicts were decided under Chapter 1 of the FAA, not under the Convention as codified

in Chapter 2, but Respondent provides no reason why that should matter here. *See* Opp. at 26-27. Chapter 2 specifies that "Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States." 9 U.S.C. § 208; *see* Pet. at 4. As discussed in detail in the Petition at 17-18, and not addressed in the Opposition, Chapter 1 of the FAA and the New York Convention are perfectly consonant in insisting that the arbitrators must be selected as specified by the parties. There is thus no reason why the case law developed under Chapter 1 for determining when and how a court should decline enforcement of an award for failure to abide by the parties' agreed selection method should not apply equally to a Convention case under Chapter 2. *See China Minmetals Materials Import & Export Co. v. Chi Mei Corp.*, 334 F.3d 274, 289 (3d Cir. 2003) (applying *First Options* requirement of *de novo* review to defense under Article V of the New York Convention).[2] Granting the petition to resolve the conflict is all the more important because it would contribute to the uniformity and consistency that is the objective of the Convention. *See Scherk*, 417 U.S. at 520.

3. The Opposition concludes with a hodgepodge of unsupported arguments for denying review, none of which can be sustained. First, Pertamina did not waive its defense. KBC

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[2] Contrary to Respondent's allegation, Opp. at 19 n.14, 27, Pertamina argued to the court of appeals that its Article V(1)(d) defenses must be decided *de novo*, and Pertamina repeatedly cited and relied upon *Brook v. Peak Int'l, Ltd.*, 294 F.3d 668 (5th Cir. 2002), which cited and relied upon *Cargill* and *Avis*, among others we have cited, for the proposition that courts generally enforce selection clauses strictly and deny enforcement when the appointment is non-conforming. *Brook*, 294 F.3d at 673. It should have sufficed to cite the Fifth Circuit to its own precedent that appeared to accept the majority rule without having to cite that authority separately. As it turns out, the Fifth Circuit's acceptance of those cases was more apparent than real, leading to the conflict presented here.

concocts of whole cloth a "strategic" reason for Pertamina and the other arbitration respondents to have declined to select an arbitrator, Opp. at 28-29, but the record shows that they were motivated by their view that the arbitration was improperly initiated and that the procedure was not in conformity with the parties' agreements, *see, e.g.*, Pet. App. 161a, 178a-180a, 191a. They presented these arguments to the tribunal as soon as it was constituted, which the tribunal found to be appropriate and timely. *See* Pet. App. 192a-193a. The Fifth Circuit did not hold there was a waiver, but even if it did, such a subsidiary holding could not independently support the judgment, both because the tribunal had rejected the argument, which is binding, *see* Pet. at 10, 21-22, and because waiver could not be found here consistently with this Court's or circuit precedent. *See First Options*, 514 U.S. at 946 (gateway issue presented at hearing was timely); *Brook v. Peak Int'l, Ltd.*, 294 F.3d 668, 674 (5th Cir. 2002) ("objections to the composition of arbitration panels must be raised 'at the time of the hearing'") (citation omitted); *Avis*, 791 F.2d at 26 (challenge to panel presented at hearing timely); Pet. at 22.

Second, resolution of the arbitrator selection issue in Pertamina's favor would necessitate declining enforcement of the award. A single award was issued by a single improperly convened tribunal that, at KBC's insistence, heard claims under two different contracts. Under the procedure KBC adopted, and the arbitrators and courts sanctioned, KBC was allowed to choose one arbitrator, while Pertamina, PLN, and the Government were required jointly to select another. None of the arbitration agreements provided for such a joint appointment by the three entities.[3] The impropriety of the

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[3] As to the UNCITRAL Rules, Opp. at 10 n.5, 24, the arbitrators recognized that the procedure provided in them could not apply directly here, Pet. App. 196a, and Pertamina has consistently argued that the specific selection methods in the parties' agreements trump those rules, Pet. at 23, which both *Cargill* and *Szuts* support. *See Cargill*, 25 F.3d at 226 n.6

selection under the ESC thus infused the selection under the JOC, too, and tainted the entire proceeding and resulting award. Under Article V(1)(d), enforcement of the unitary award should be denied.

Finally, Respondent's argument about lack of prejudice is just silly. The Fifth Circuit admittedly did not adopt it, Opp. at 29, and none of the cases require such a showing as to improper arbitrator selection. To the contrary, *Avis* places the burden on the party seeking a variance from the agreed selection procedure. *See Avis*, 791 F.2d at 25-26.

There is good reason why a particularized showing of prejudice is not required. The prejudice is self-evidently inherent, given the critical function of arbitrator selection and party participation in it. "That ***selecting the tribunal is the most important decision to be made*** in any international arbitration (apart from the rendering of the actual award) is, by now, cliché. It also still happens to be true." Gerald Aksen, *The Tribunal's Appointment* in THE LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION 31 (L. Newman & R. Hill eds. 2004) (emphasis added). "The essence of arbitration—that which distinguishes the process from court adjudication—is freedom of choice. . . . ***Choosing an arbitrator*** or arbitration tribunal ***is the most important decision facing parties in commercial arbitration*** . . . ." COMMERCIAL ARBITRATION AT ITS BEST 67 (T. Stipanowich & P. Kaskell eds. 2001) (emphasis added). The selection of arbitrators is "probably the single most important stage in the proceedings," and the role of the party-appointed arbitrator is

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(holding that rules of administering body could not be followed because they conflicted with the parties' agreed selection method); *Szuts*, 931 F.2d at 831-32 (specific method agreed by the parties takes precedence over any arbitration rules adopted by reference). In any case, the UNCITRAL Rules do not insulate the tribunal's gateway decisions from *de novo* review under *First Options*. *See China Minmetals*, 334 F.3d at 287-89.

to ensure "that the appointing party has its positions fairly considered." Carolyn Lamm & David Rivkin, *International Disputes* in ALTERNATIVE DISPUTE RESOLUTION 307, 317-18 (N. Atlas, S. Huber, E. Trachte-Huber eds. 2000). Because of this, everyone understands that interference with the agreed-upon selection method is prejudicial – which is why it is a defense under Article V(1)(d) of the New York Convention. Moreover, proving actual prejudice, as Respondent insists, would require "an ***impossible*** showing . . . that the complaining party would have obtained a more favorable award from the properly selected arbitrator than the award actually rendered by the improperly selected arbitrator." *Brook v. Peak Int'l, Ltd.*, 169 F. Supp. 2d 641, 647 (W.D. Tex. 2001) (emphasis original), *rev'd on other grounds*, 294 F.3d 668 (5th Cir. 2002).

4. There is no merit to the Opposition's insinuation that, merely by resisting the award and petitioning this Court, Pertamina is acting illegitimately. It is well recognized that a party against whom an international arbitration award has been rendered need not seek judicial relief proactively but may interpose its New York Convention defenses to the prevailing party's enforcement efforts. *See, e.g., Paklito Investment Ltd. v. Klockner East Asia Ltd.*, [1993] 2 HKLR 39, 48-49; ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 487 (3d ed. 1999).[4] That is what Pertamina has done here.

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[4] The Central Jakarta District Court granted Pertamina's petition to set aside the award on a variety of grounds, including that the tribunal was improperly constituted. *See* TSR. 3109-3100. The Brief for the Republic of Indonesia as *Amicus Curiae* in Support of the Petitioner amply demonstrates why the Indonesian court's judgment should have been given effect under Article V(1)(e) of the Convention. The comity concerns expressed in that brief bolster granting the petition to provide relief under Article V(1)(d).

That the award is fundamentally unsound is well documented. *See* Louis Wells, *Double Dipping in Arbitration Awards? An Economist*

Meaningful judicial review of the award, as should be assured by the New York Convention, is a "necessary safeguar[d]" to ensure that the award and the procedures giving rise to it do not offend the parties' arbitration agreement, due process, or public policy. *M&C Corp. v. Erwin Behr GmbH*, 87 F.3d 844, 847 (6th Cir. 1996).

Moreover, contrary to Respondent's assertion, Opp. at 1, the Petition presents a sharply focused, well-developed issue of general importance that is neither fact-bound nor remote – whether arbitration selection clauses must be enforced strictly via *de novo* review. This goes to the core of party consent, which is the foundation of arbitration. As a recent, post-*Green Tree* decision has aptly held, violation of the agreed-upon arbitrator selection method "may transform a fair and efficient adjudicative proceeding into a sham trial . . . [and] destroy the legitimacy of the entire arbitration proceeding." *Encyclopedia Universalis, S.A. v. Encyclopedia Britannica, Inc.*, 2003 WL 22881820 at *1 (S.D.N.Y. Dec. 4, 2003). That is what happened here. Such a fundamental violation, sanctioned in conflict with the holdings of four other circuits, is indeed important and warrants this Court's review.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for writ of certiorari should be granted.

Questions Damages Awarded to Karaha Bodas Company in Indonesia, 19 ARB. INT'L 471 (2003). The *Himpurna* and *Patuha* awards, Opp. at 12 & n.8, offer no support. They refused lost profits for generating capacity not yet constructed or being built, R.1407-1406, R.1399, R.1431, R.1424-1423, as is the case here, and considered doing so "would be like stepping on the shoulders of a drowning man." R.1399. The Opposition is unmoored in claiming even that construction financing had been committed, Opp. 11 n.7; all KBC claimed was that a shareholder was prepared to finance the project. *See* Pet. App. 7a, 248a.

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IN THE

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PT PERTAMINA (PERSERO), F/K/A/ PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA,

Petitioner,

v.

KARAHA BODAS COMPANY, L.L.C.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE REPUBLIC OF INDONESIA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, the Republic of Indonesia ("Republic") moves for leave to file the accompanying brief as *amicus curiae* in support of the petition for a writ of certiorari. Counsel for Petitioner has consented to the filing of this brief, but counsel for the Respondent has withheld consent.

The Republic is a sovereign state that has a direct interest in this case for several reasons. It is the sole owner of Petitioner PT Pertamina (Persero) ("Pertamina")[1] and, by law, has directed Pertamina to help manage on the nation's behalf the exploration, development, and exploitation of Indonesia's oil and gas resources. As a state-owned company, Pertamina must turn over revenues it derives from the sale of Indonesia's oil and gas to the Indonesian treasury for the welfare of the Indonesian people. The Republic owns most of the hundreds of millions of dollars in oil and gas revenues in trust accounts in the United States that Respondent Karaha Bodas Company L.L.C. ("KBC") has restrained in its indiscriminate efforts to enforce its arbitral award against Pertamina.

For purposes of the Republic's appearance as an *amicus curiae* before this Court, however, its most pressing interest is to vindicate its status as a co-equal signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, *codified in* the Federal Arbitration Act at 9 U.S.C. §§ 201–208 ("New York Convention" or "Convention"). Applying governing Indonesian law to interpret the arbitration

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[1] Pertamina was formerly known as Perusahaan Pertambangan Minyak Dan Gas Bumi Negara.

clause at issue, the Central Jakarta District Court ("Jakarta Court") determined that Indonesia has primary jurisdiction, *i.e.*, competence to set aside or annul the arbitral award issued in favor of KBC, within the meaning of Article V(1)(e) of the New York Convention. In August 2002, the Jakarta Court issued an order annulling the award as a matter of public policy, reasoning that under Indonesian principles of contract interpretation the arbitration agreements clearly manifest the parties' choice of Indonesian law to govern the arbitration.

The Fifth Circuit disregarded the decision of the Jakarta Court, however, holding that Switzerland and not Indonesia had primary jurisdiction under the Convention. The Court of Appeals rested its decision on a presumption, unsupported in the language of the Convention, "that designating the place of the arbitration also designates the law under which the award is made." Pet. App. 22a. Because the parties selected Switzerland as the place of the arbitration proceedings, the Fifth Circuit inferred that Swiss law governed the arbitration and that Switzerland had primary jurisdiction.

The Fifth Circuit's decision merits review because it conflicts with this Court's precedents and with decisions of other federal courts of appeals. Even more fundamentally, the Fifth Circuit's decision warrants review because it raises serious issues for U.S. foreign relations. By confirming an arbitral award already set aside by the Jakarta Court, on the basis of a presumption and without conducting any reasoned choice of law analysis, the decision below presents an affront to the Republic. The Jakarta Court's decisions recognizing its own jurisdiction and annulling the arbitral award are entitled to deference under the terms of the New York Convention and the principle of international comity. Yet the Fifth Circuit cast aside the Jakarta Court's determination of its own jurisdiction, along with its order

setting aside the arbitral award in accordance with Indonesian law and public policy and in full compliance with the terms of the Convention—a treaty acceded to by the United States as well as by Indonesia. That such disregard for the judicial decisions of a co-equal signatory to the New York Convention resulted from the application of a legal presumption unsupported by the Convention's text seriously undermines the Convention's foundational principle of international comity.

The Fifth Circuit's decision to confirm KBC's arbitral award raises the question whether the parties' choice of arbitral law—and, by extension, the place of primary jurisdiction under the New York Convention—should be determined according to a presumption in favor of the place where the arbitral proceedings will be held that can be rebutted only if the parties designate another law expressly. This question presents an independent basis for review, in addition to Pertamina's arguments (endorsed by the Republic) that the Fifth Circuit incorrectly confirmed an arbitral award rendered by a tribunal constituted contrary to the parties' intent. Pet. i, 15–17. The Republic exclusively addresses this choice of law question in the accompanying brief.[2]

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[2] Although the Court does not "ordinarily address issues raised only by *amici*," *Kamen v. Kemper Fin. Serv., Inc.*, 500 U.S. 90, 97 n.4 (1991), it has done so before. *See generally Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 37–38 (1991) (Stevens, J., dissenting) (discussing cases where the Court has addressed issues not presented in the petition for certiorari). The Court should consider the choice of law question raised by the Republic here, because that question presents decisional conflicts on an important question of federal law and implicates serious issues of U.S. foreign relations. Unlike the situation in *Knetch v United States*, 364 U.S. 361, 370 (1960) and related decisions, this question was fully briefed by the parties below (and by the Republic appearing as *amicus curiae*) and addressed by the Fifth Circuit in its opinion. Pet. App. 15a–26a.

Accordingly, the Republic's motion for leave to file the accompanying brief as *amicus curiae* should be granted.

Respectfully submitted,

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INTEREST OF THE *AMICUS CURIAE*

The interest of the *amicus curiae* is described in the accompanying motion for leave to file this brief.[3]

STATEMENT

This case arises out of proceedings brought by Respondent Karaha Bodas Company L.L.C. ("KBC") against Petitioner PT Pertamina (Persero) ("Pertamina") under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, *codified in* the Federal Arbitration Act at 9 U.S.C. §§ 201–208 ("New York Convention" or "Convention"), to confirm an arbitral award now totaling approximately $300 million.

Statutory Background. The New York Convention's "carefully structured framework for the review and enforcement of international arbitral awards," Pet. App. 12a, rests on a key distinction between courts of primary and secondary jurisdiction. "Under the Convention, 'the country in which, or under the [arbitration] law of which, [an] award was made' is said to have primary jurisdiction over the arbitration award. All other signatory states are secondary jurisdictions, in which parties can only contest whether that state should enforce the arbitral award." *Id.* at 13a (quoting *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 364 (5th Cir. 2003) (footnotes omitted)). Primary jurisdiction is determined by "'the regimen or scheme of arbitral procedural law under which the arbitration was conducted, and not the substantive law . . . applied in the

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[3] Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* Republic of Indonesia hereby affirms that no counsel for a party authored this brief in whole or part and that no one besides the Republic and its counsel made a monetary contribution to the preparation and submission of this brief.

case.'"[4] *Id.* at 17a (quoting *Int'l Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera, Indus. Y Comercial*, 745 F. Supp. 172, 178 (S.D.N.Y. 1990)). Because only a court of primary jurisdiction can annul an arbitral award, the parties' choice of law governing the arbitration (*i.e.*, the *lex arbitri*) is perhaps the central question for enforcement proceedings under the Convention. *See* W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION 116 (1992) (describing the distinction between primary and secondary jurisdiction as "central to the control system of the New York Convention").

The Agreements Between Pertamina and KBC. In November 1994, KBC and Pertamina entered into two contracts for the development of geothermal power in the Republic of Indonesia ("Republic"). The Joint Operation Contract ("JOC"), signed by KBC and Pertamina, concerned the development of geothermal energy in the West Java region of Indonesia. The Energy Sales Contract ("ESC"), entered into by KBC, Pertamina, and PT PLN (Persero) ("PLN"), Indonesia's state-owned electric utility, governed the sale to PLN of electricity produced from geothermal energy at facilities constructed by KBC.

The arbitration clauses in the JOC and ESC incorporated certain provisions of Indonesian arbitration law and modified the parties' rights thereunder. Among other things, the parties waived their rights under the Indonesian Code of Civil Procedure to the arbitrators' term limit, the time for completing the arbitration, and a judicial appeal from the arbitral panel's decision. Pet. App. 19a n.31 (discussing references to Indonesian law in the JOC and ESC). By incorporating these references, the parties indicated their choice of Indonesian law to govern

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[4] It is undisputed that the parties selected Indonesian substantive law to govern the merits of the arbitration. Pet. App. 18a.

the arbitration, notwithstanding their selection of Switzerland as the place of the arbitration proceedings.

The Arbitration Proceedings. Upon suspension of the JOC and ESC projects by presidential decree as a result of the economic crisis that swept Asia in the 1990s, KBC initiated a single arbitration against Pertamina and PLN for the alleged breach of both contracts. The arbitral tribunal awarded KBC approximately $261 million plus judgment interest for costs and lost profits. *Id.* at 8a. As one of several enforcement actions around the world, KBC brought the present action to confirm the arbitral award pursuant to the New York Convention in the U.S. District Court for the Southern District of Texas.

Judicial Proceedings in the U.S. and Indonesia. KBC's motion for summary judgment to confirm the award was granted on December 4, 2001. *Id.* at 56a–90a. Pertamina appealed to the U.S. Court of Appeals for the Fifth Circuit, which affirmed the district court judgment in an opinion dated March 23, 2004. *Id.* at 1a–55a.

Before the Fifth Circuit could decide the appeal, the Central Jakarta District Court ("Jakarta Court") issued an order in April 2002 holding that it had jurisdiction under Article 67(1) of Indonesia's new Arbitration Law No. 30/1999 to hear Pertamina's application for annulment of the award under the New York Convention. In August 2002, after full briefing and hearing, the Jakarta Court ordered the award annulled. The court held that (1) the JOC and ESC indicated the parties' intent that Indonesian law would govern the arbitration; (2) Indonesia was the primary jurisdiction to set aside or annul the award within the meaning of Article V(1)(e) of the New York Convention, and Indonesian law authorized the court to do so; (3) the award was annulled, pursuant to Article V(2)(b) of the Convention, because it violated Indonesian public policy by holding Pertamina liable for the suspension of projects governed by the JOC and ESC

despite the nature of that suspension as *force majeure* under Indonesian law.

The Republic appeared before the Fifth Circuit as *amicus curiae* in support of Pertamina's appeal. Both the Republic and Pertamina argued that the award should not be enforced, among other reasons, because it had been set aside by the Jakarta Court. Pet. App. 2a n.3 ("One of the issues before this panel is whether the Indonesian court's order is a defense to the enforcement of the Award."). In particular, the Republic argued that, as a matter of federal common law, Indonesian law governed the arbitration because of the parties' references to Indonesian arbitration law in the JOC and ESC. Given that evidence of the parties' intent, the Republic argued that the award was rendered under the law of Indonesia. The Republic further argued, based on the language of Article V(1)(e), "that the New York Convention permits more than one country to have primary jurisdiction over an arbitration award." *Id.* at 51a. Accordingly, the Republic maintained that Indonesia, and thus the Jakarta Court, had primary jurisdiction and that that court's decision "provid[es] a defense to enforcement in the United States." *Id.* at 17a–18a.

The Fifth Circuit rejected the Republic's choice of law analysis. Rather than looking to the parties' agreements and conducting a choice of law analysis under federal common law to determine the parties' choice of law governing the arbitration, the Court of Appeals relied on a textually unsupported "strong presumption" purportedly under the New York Convention "that designating the place of the arbitration also designates the law under which the award is made." *Id.* at 22a. The court emphasized that "an express designation of Indonesian procedural law [would be] necessary to rebut" this presumption. *Id.* Reasoning that the multiple references to Indonesian law in the contracts "fall far short" of the "express designation" required to rebut the

presumption, *id.* at 21a–22a, the Fifth Circuit concluded (based on this presumption) that the parties' selection of Switzerland as the place of the arbitration proceedings meant that Switzerland has primary jurisdiction under the New York Convention to annul the arbitral award. *Id.* While acknowledging that the language of Article V(1)(e) "suggests the potential for more than one country of primary jurisdiction," the Fifth Circuit nonetheless held that "the predominant view is that the Convention permits only one in any given case." *Id.* at 51a–52a. For these reasons, the Court of Appeals concluded that only "Swiss procedural law applied," *id.* at 18a, and declined to recognize the Jakarta Court's decision annulling the award. *Id.*

SUMMARY OF ARGUMENT

Review should be granted for several reasons in addition to those set forth in the petition. The Fifth Circuit's decision conflicts with this Court's precedents and with decisions of other federal circuits concerning the correct rule to identify the place of primary jurisdiction under the New York Convention. Moreover, those conflicts arise from a holding—that the law governing an arbitration and, by extension, the place of primary jurisdiction is determined by an inflexible presumption in favor of the law of the place where the arbitral proceedings will be held—not supported by the Convention's text or precedent. By declining to apply a reasoned choice of law analysis and recognize as a result of that analysis the valid judgment of an Indonesian court that properly exercised primary jurisdiction under the Convention, the decision below presents an affront to the Republic of Indonesia that undermines the principle of international comity on which the Convention's structure is built. Such an affront implicates serious issues of U.S. foreign relations and thus presents another reason to grant review.

ARGUMENT

I. THE FIFTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS HOLDING THAT COURTS MUST ENFORCE ARBITRATION AGREEMENTS ACCORDING TO THEIR TERMS

1. Review is merited because the Fifth Circuit's decision conflicts with this Court's precedents emphasizing that the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.* ("FAA"), requires a court to enforce arbitral agreements according to their terms. *See, e.g.*, *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) (holding that "courts are bound to interpret contracts in accordance with the expressed intentions of the parties—even if the effect of those intentions is to limit arbitration"); *Volt Info. Sci., Inc. v. Bd. of Trustees*, 489 U.S. 468, 478 (1989) (holding that the FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms"); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985) (stating that "as with any other contract, the parties' intentions control").[5]

This Court has explained that enforcing the parties' intent implements "the central purpose" of the FAA. *Mastrobuono*, 514 U.S. at 53–54; *accord Volt*, 489 U.S. at 478 (describing "Congress' principal purpose of ensuring that private arbitration agreements are enforced according to their terms"). Indeed, the Court has long adhered to the principle of enforcing arbitration

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[5] In its willful refusal to apply the correct choice of law rule and its apparent bias toward foreign law, the decision below resembles *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3 (1975) (per curiam). There the Court summarily reversed a Fifth Circuit decision that refused to apply the controlling Texas choice of law rule, in part, because it would require the application of Cambodian law. *Id.* at 4.

agreements according to their terms, even when that principle appeared to conflict with other strong federal policies. *See, e.g.*, *id.* at 479 ("Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward."); *Mitsubishi* at 636 ("[W]here the international cast of a transaction would otherwise add an element of uncertainty to dispute resolution, the prospective litigant may provide in advance for a mutually agreeable procedure whereby he would seek his antitrust recovery as well as settle other controversies."). Enforcing arbitration agreements according to their terms harmonizes these apparently clashing aims by permitting courts to "give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind the FAA." *Volt*, 489 U.S. at 479.

Such an unwavering focus on the terms of an arbitration agreement follows from the axiom that "[a]rbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Id.* The Court has expressly recognized that this principle of party autonomy extends to the choice of law. *Id.* ("Just as [the parties] may limit by contract the issues which they will arbitrate . . . so too may they specify by contract the rules under which that arbitration will be conducted."). Identifying which jurisdiction's law the parties chose to govern the arbitration thus "comes down to what the contract has to say." *Mastrobuono*, 514 U.S. at 58.

2. Plenary review is warranted because the Fifth Circuit's decision contradicts this Court's precedents in *Mastrobuono*, *Volt*, and *Mitsubishi*. The Court of Appeals did not simply enforce the JOC and ESC, "like other contracts, in accordance with their terms." *Volt*, 489 U.S.

at 478. Instead, the court applied a "strong presumption that designating the place of the arbitration also designates the law under which the award is made." Pet. App. 22a. By design, this presumption misdirects a court away from "giv[ing] effect to the contractual rights and expectations of the parties." *Volt*, 489 U.S. at 479. Moreover, the Fifth Circuit fortified this untenable presumption by requiring "an *express designation* of Indonesian procedural law" as the only effective form of rebuttal. Pet. App. 22a (emphasis added). On that basis, the Court of Appeals managed to trivialize or dismiss the parties' incorporation of Indonesian arbitration law in the JOC and ESC, concluding that such references "fall far short" of rebutting the presumption and establishing Indonesia as the place of primary jurisdiction under the New York Convention. *Id.* Because the Fifth Circuit's all-but-irrebuttable presumption requires a court to disregard the terms of the parties' agreement when deciding the central question of primary jurisdiction, the conflict with this Court's precedents under the FAA could not be sharper.[6]

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[6] The Fifth Circuit's holding that "[j]udicial estoppel provides an additional ground for concluding that Swiss procedural law applied to the arbitration proceeding," Pet. App. 26a, does not provide an uncontroversial basis on which "to decide the case on another ground and thus not reach the point upon which there is conflict." ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 231 (8th ed. 2002). Judicial estoppel requires a showing that a party's statements are "clearly inconsistent," Pet. App. 25a, or mired in "'intentional self-contradiction.'" *New Hampshire v. Maine*, 532 U.S. 742, 751 (2001) (quoting *Scarano v. Cent. R.R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953)). Pertamina's statements regarding the applicability of Swiss and Indonesian law are neither clearly inconsistent nor intentionally self-contradictory. Switzerland and Indonesia both meet the test of a primary jurisdiction under Article V(1)(e), and the Fifth Circuit itself recognized that the New York Convention "suggests the potential for more than one country of primary jurisdiction." Pet. App. 51a–52a. Until the court decided "that the Convention permits only one [primary jurisdiction] in any given case," the question was one of first impression on which scholarly opinion was divided. *See id.* at 52a &

II. THE FIFTH CIRCUIT'S DECISION PRESENTS A CONFLICT IN PRINCIPLE WITH DECISIONS OF OTHER FEDERAL COURTS OF APPEALS

Review is warranted because the Fifth Circuit's decision presents a conflict in principle with decisions of the First and Second Circuits on the question of whether federal common law governs the choice of law under the New York Convention. The Fifth Circuit decided which law governed the arbitration by applying "the strong presumption that designating the place of the arbitration also designates the law under which the award is made." Pet. App. 22a. The Court of Appeals purported to find this presumption "[u]nder the New York Convention," but cited only commentary and not any language in the Convention itself. *Id.* at 19a–20a & n.32. Based on its "strong presumption," the court rejected the argument by Pertamina and the Republic "that the district court should have conducted a choice of law analysis to determine the law that would apply to the interpretation of the parties' contracts," *id.* at 22a, and thereby their intended choice of governing law. Instead, the Fifth Circuit concluded that "the parties presumptively chose Swiss procedural law as the *lex arbitri* when they designated Switzerland as the site of the arbitration, and that presumption is unrebutted." *Id.* at 22a–23a (footnote omitted).

The First Circuit took a contrary approach in *InterGen N.V. v. Grina*, 344 F.3d 134 (1st Cir. 2003). There the Court of Appeals applied federal common law to decide under the New York Convention whether nonsignatories to arbitration agreements could compel the arbitration of certain claims against them. *Id.* at 143. The court held

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n.123. Because the application of judicial estoppel on this record is dubious, this Court may reach the choice of law question presented by the Republic.

that "[t]his is a federal question case . . . and we therefore look to federal choice of law principles." *Id.* Further, the court approached the task of devising a rule of decision "mindful that federal common law incorporates general principles of contract and agency law." *Id.* at 144.

Similarly, the Second Circuit decided under the New York Convention that assignments made after the effective date of agreements containing arbitration clauses did not deprive the assignees of the right to compel arbitration. *Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 95 (2d Cir. 1999). Like the First Circuit, the Second Circuit had no difficulty concluding that federal common law applied: "When we exercise jurisdiction under Chapter Two of the FAA, we have compelling reasons to apply federal law, which is already well-developed, to the question of whether an agreement to arbitrate is enforceable." *Id.* at 96. Again like the First Circuit, the Second Circuit looked to "'ordinary principles of contract and agency.'" *Id.* at 97 (quoting *McAllister Bros., Inc. v. A & S Transp. Co.*, 621 F.2d 519, 524 (2d Cir. 1980)).

The Fifth Circuit's decision conflicts in principle with *InterGen* and *Smith/Enron* with respect to whether federal common law governs the determination of the parties' choice of governing arbitral law under the New York Convention. Where the Fifth Circuit declined to conduct a choice of law analysis, the First and Second Circuits conducted one. Even more significantly, where the Fifth Circuit concluded that the Convention itself supplied the correct source of law, in the form of a legal presumption in favor of applying the law of the place of the arbitration proceedings, the First and Second Circuits adopted federal common law and looked to traditional principles of contract and agency law.

This conflict over the correct choice of law rule under the New York Convention is outcome-determinative in this case. As explained in greater detail below, applying a

federal common law choice of law analysis under the Restatement would have led the Fifth Circuit to conclude that Indonesian law governs any arbitration under the JOC and ESC. Given that conclusion, the Court of Appeals would have had to deny confirmation of the arbitral award in the United States based on the Jakarta Court's order annulling the award.

III. THIS CASE INVOLVES A QUESTION OF NATIONAL IMPORTANCE

The choice of law question presented by the Republic is an issue of national importance that only this Court can finally resolve. The importance of the question presented has been noted as the sole reason prompting review in a previous New York Convention case. *See Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510 (1974).

Deciding the correct choice of law rule used to identify the law governing an arbitration agreement is intrinsically important by virtue of the central role played by the distinction between primary and secondary jurisdiction under the New York Convention. REISMAN at 116 ("The distinction between primary and secondary jurisdictions is, in my view, central to the control system of the New York Convention and has been an important reason for the attractiveness of the regime to its various consumers."). This question substantially determines the rights of the parties to enforce or resist enforcement of the arbitral award. Pet. App. 12a–15a (explaining the distinction between primary and secondary jurisdiction under the Convention and the effect of that distinction on the rights of arbitral parties).

Deciding the choice of law rule to identify the law governing an arbitration holds great practical importance given the growing use of international arbitration. *Mitsubishi*, 473 U.S. at 638 ("As international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the

course of that trade."). Arbitration now provides the "normal, rather than alternative, way of settling international commercial disputes." Elena V. Helmer, *International Commercial Arbitration: Americanized, "Civilized," or Harmonized?*, 19 OHIO ST. J. ON DISP. RESOL. 35, 39 (2003). "[S]tatistics from twelve of the major clearinghouses for arbitration show that the number of cases submitted to international arbitration almost doubled between 1992 and 2000." Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 441 (2003). This trend toward international arbitration includes many cases (like this one) where at least one of the parties is a foreign state or state-owned entity. *See, e.g., 2003 Statistical Report*, 15 ICC INT'L COURT OF ARBITRATION BULLETIN No. 1, Spring 2004 (stating that in 2003, foreign states and state-owned entities were parties to 11% of cases registered before the International Chamber of Commerce International Court of Arbitration).

The New York Convention has played a lead role in this development. More than 70% of the world's nations have acceded to the Convention,[7] and "dispute resolution by nonstate entities, backed up by enforcement in national courts under the New York Convention, is now an essential part of the global dispute resolution system." Martinez at 441.

IV. THE NEW YORK CONVENTION DOES NOT SUPPORT A PRESUMPTION IN FAVOR OF THE LAW OF THE PLACE WHERE THE ARBITRAL PROCEEDINGS ARE HELD

The Fifth Circuit's decision below—"that designating the place of the arbitration also designates the law under

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[7] Out of 192 independent nation-states in the world, U.S. Dept. of State, Fact Sheet, "Independent States in the World," *available at* http://www.state.gov/s/inr/rls/4250.htm (last visited July 19, 2004), 135 nations have acceded to the Convention. *See* N.Y. Convention.

which the award is made," Pet. App. 22a—not only presents multiple decisional conflicts that warrant review, but the decision is incorrect. The presumption in favor of the law of the place of the arbitral proceedings applied by the Court of Appeals is unsupported by the language or precedent of the New York Convention. By applying this presumption, the Court of Appeals managed to avoid a necessary choice of law analysis. If the court had applied a correct federal common law choice of law rule, the court would have concluded that Indonesian law supplies the governing law under the contracts. Moreover, the Fifth Circuit's presumption effectively deprived Pertamina of a lawful and complete defense to confirmation of KBC's arbitral award.

1. Here, "the district court had secondary jurisdiction" within the meaning of the New York Convention. *Id.* at 13a. That authority required the court to refuse enforcement based on any of "the grounds specified in Article V," *id.* at 14a–15a,[8] including when

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[8] The duty not to enforce an award set aside by a court of primary jurisdiction is obligatory. *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194, 197 (2d Cir. 1999) (declining to construe Article V(1)(e)—"[r]ecognition and enforcement of the award may be refused," N.Y. Convention art. V(1)—as imposing a permissive duty under which arbitral awards can be confirmed "notwithstanding the Nigerian judgments vacating them"); *Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 318 (2d Cir. 1998) (stating that "under Article V of the Convention, an award should not be enforced if it is set aside or suspended in the originating country"); *accord* REISMAN at 114 (stating that "once an award has been set aside in a primary jurisdiction, it is not supposed to be enforceable anywhere else"); Albert Jan van den Berg, *When Is an Arbitral Award Nondomestic Under the New York Convention of 1958?*, 6 PACE L. REV. 25, 42 (1985) (stating that "if the arbitral award has been set aside in the country of origin, foreign courts are bound by that decision. In that case they must refuse recognition and enforcement of the award."). However, on this point the Second Circuit conflicts with the decision below and the Eleventh Circuit. *See* Pet. App. 17a; *Four Seasons Hotels and Resorts, B.V. v. Consorcio Barr S.A.*, Nos. 02-16794, 03-13418, 2004 WL 1615611, slip op. at 17 n.6 (11th Cir. July 22, 2004).

the arbitral award "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." N.Y. Convention art. V(1)(e).

Pertamina and the Republic argued that the decision of the Jakarta Court annulling the arbitral award provides a valid defense to confirmation of the award. They pointed out that Article V(1)(e) vests primary jurisdiction in two places: "the country in which . . . that award was made" and "the country . . . under the law of which, that award was made." *See* Pet. App. 51a (quoting N.Y. Convention art. V(1)(e)); *accord M & C Corp. v. Erwin Behr GmbH & Co.*, 87 F.3d 844, 849 (6th Cir. 1996) (holding that "a motion to vacate may be heard only in the courts of the country where the arbitration occurred or in the courts of the country whose *procedural* law was specifically invoked in the contract calling for arbitration of contractual disputes"). Because the JOC and ESC contain no choice of law clause designating the source of governing law expressly, Pertamina and the Republic insisted that the district court should have applied a federal common law rule under Section 187 of the Restatement (Second) of Conflict of Laws and inferred from numerous references to the Indonesian Civil Procedure Code (including the arbitration law) in the JOC and ESC's arbitration provisions that the contracting parties intended Indonesian law to govern any arbitration arising from those contracts. Pet. App. 19a.

2. The Fifth Circuit disagreed. Despite its limited authority under the New York Convention as a court of secondary jurisdiction, the Court of Appeals declined to recognize the validity of the Jakarta Court's decision annulling the arbitral award on the basis of a legal presumption that lacks any support in the language of the Convention.[9] Unmoored from the language of the

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[9] *Scherk* does contain dicta that "[u]nder some circumstances, the designation of arbitration in a certain place might also be viewed as

Convention, this presumption violates the first rule of treaty interpretation that a court must "begin 'with the text of the treaty and the context in which the written words are used.'" *Société Nationale Industrielle Aérospatiale v. United States Dist. Ct. for S. Dist. Iowa*, 482 U.S. 522, 534 (1987) (quoting *Air France v. Saks*, 470 U.S. 392, 397 (1985)). The Fifth Circuit cited no case law in support of its presumption, Pet. App. 20a n.32, and relevant decisions run contrary to that presumption. *See Mitsubishi*, 473 U.S. at 625 (rejecting a "presumption against arbitration of statutory claims"); *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 21 n.3 (2d Cir. 1997) (recognizing that the New York Convention permits parties to elect a governing law other than that of the state where arbitral proceedings are held). Commentaries cited by the Court of Appeals offer only tepid support for its presumption: most of them characterize an agreement to conduct arbitration in one country but applying the law of another country as unusual without inferring that there is a legal presumption against such an agreement mandated by the Convention.[10] Pet. App. 20a. Indeed, commentators

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implicitly selecting the law of that place to apply to that transaction." 417 U.S. at 519 n.13. However, the Court has never reiterated or followed this statement. On the contrary, since deciding *Scherk* the Court has repeatedly held that arbitration agreements must be enforced according to contract principles, *see, e.g.*, *Volt*, 489 U.S. at 476, an interpretive rule that forecloses the application of any presumption that would defeat the parties' intent.

[10] Two of the commentaries cited by the Fifth Circuit do rely on a legal presumption equating the place of an arbitration with the application of that nation's procedural law. *See* MICHAEL J. MUSTILL & STEWART C. BOYD, COMMERCIAL ARBITRATION 64 (2d ed. 1989); Martin Hunter, *Case and Comment: International Arbitration*, [1988] LLOYD'S MAR. & COMM. L.Q. 23, 26. However, the force of the English precedent on which these sources rely is diminished by other English decisions holding that the parties' choice of procedural law may be "inferred from the choice of seat *or from the other terms and circumstances of the transaction.*" MUSTILL & BOYD at 65 (citing *James Miller & Partners Ltd. v. Whitworth St. Estates*, [1970] 1 Lloyd's Rep.

recognize that the place of the arbitration proceedings can be chosen for the sake of convenience and not to provide the governing law. *See* HAMID G. GHARAVI, THE INTERNATIONAL EFFECTIVENESS OF THE ANNULMENT OF AN ARBITRAL AWARD 107–08 (2002) (discussing the trend that has reduced the importance of the place of arbitration as a "seat" because it "is chosen by the parties and arbitral institutions mainly based on commodity or logistic related considerations").

3. The Fifth Circuit's "strong presumption" in favor of the law of the arbitral forum is no substitute for a reasoned choice of law analysis under the federal common law; it is simply a device for avoiding such an analysis. Because the Court of Appeals could not identify what arbitral law applies and, by extension, the place of primary jurisdiction without conducting a threshold choice of law analysis, such an analysis was unavoidable. By failing to conduct a reasoned choice of law analysis, the court defaulted on its fundamental duty to "identify and apply the proper construction of governing law." *See Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991).

If the Fifth Circuit had conducted a choice of law analysis, it would have applied federal common law which, in turn, would have led the Court of Appeals to the Restatement (Second) of Conflict of Laws. *See, e.g., Curtin v. United Airlines, Inc.*, 275 F.3d 88, 93 n.6 (D.C. Cir. 2001) (stating in a case under the Warsaw Act that "[c]ourts also often look to the U.C.C. and Restatement when deciding questions of federal common law"). Section 218 of the Restatement (Second) of Conflict of Laws

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269 (1970) (emphasis added). The leading commentator on the New York Convention has written that this presumption would only apply absent "any indication" in the arbitration agreement of another law governing the arbitration. ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958, at 292–93 (1981) (discussing the term "failing any indication thereon" under the New York Convention in the context of Articles V(1)(a) and (e)).

addresses the "Validity and Effect of Arbitration Agreement" and provides that the rights created by an arbitration agreement are determined by reference to the choice of law principles set forth in Section 187. Under Section 187, "[t]he law of the state chosen by the parties to govern their contractual rights and duties" under their agreement will be applied. Restatement (Second) of Conflict of Laws § 187. The parties' choice of law governing that agreement need not be express: "the fact that the contract contains legal expressions, or makes reference to legal doctrines, that are peculiar to the local law of a particular state may provide persuasive evidence that the parties wished to have this law applied." *Id.* § 187, cmt. a.

Here, the JOC and ESC arbitration agreements not only incorporate numerous provisions of Indonesian civil procedure, those references purport to alter the ordinary effect of Indonesian law. Pet. App. 19a n.31. These provisions were peculiar to Indonesian law and foreign to Swiss law. Under Section 187, the Fifth Circuit should have concluded that KBC and Pertamina chose Indonesian law to govern their arbitration.

4. The Fifth Circuit's disregard for the parties' incorporation of Indonesian law and application of an unfounded presumption in favor of Swiss law deprived Pertamina of a lawful and complete defense to confirmation of KBC's arbitral award. The FAA and the New York Convention "recognize a party's right to *object* to confirmation *on specified grounds*." *M & C Corp.*, 87 F.3d at 849. Article V(1)(e) specifically entitles a party to challenge confirmation in a court of secondary jurisdiction based on an order from a court of primary jurisdiction setting aside the arbitral award. N.Y. Convention art. V(1)(e). The decision below deprived Pertamina of a defense that the New York Convention expressly provides, based on a purported presumption with no basis in the text of the Convention.

V. THE FIFTH CIRCUIT'S DECISION VIOLATES THE PRINCIPLE OF INTERNATIONAL COMITY AND IMPLICATES SERIOUS ISSUES OF FOREIGN RELATIONS

The Fifth Circuit's incorrect choice of law analysis led the court to violate the principle of international comity by failing to defer to the Jakarta Court's decision annulling KBC's arbitral award. *See Diorinou v. Mezitis*, 237 F.3d 133, 142 (2d Cir. 2001) ("American courts will normally accord considerable deference to foreign adjudications as a matter of comity."). This Court has "long recognized the demands of comity in suits involving foreign states, either as parties or as sovereigns with a coordinate interest in the litigation" and has enjoined courts to "take care to demonstrate due respect . . . for any sovereign interest expressed by a foreign state." *Société Nationale*, 482 U.S. at 546. Yet the Court of Appeals failed to accord the Republic such respect when it disregarded the parties' choice of governing law and treated the Jakarta Court's decision as a legal nullity, based on an unfounded presumption that misidentified Switzerland as the place of primary jurisdiction.

This violation of international comity undermines the structure of the New York Convention. The Fifth Circuit's results-driven presumption in favor of the place of the arbitration proceedings and bias against Indonesian law invites reciprocal disrespect for U.S. judgments abroad. *See Gau Shan Co., Ltd. v. Bankers Trust Co.*, 956 F.2d 1349, 1355 (6th Cir. 1992) (where U.S. courts fail to recognize the jurisdiction of foreign courts, "[f]oreign courts can be expected to reciprocate such disrespect."). Without mutual recognition of valid foreign judgments, the New York Convention's central distinction between primary and secondary jurisdiction will fall apart.

Failing to recognize the Jakarta Court's judgment also presents an affront to the Republic that threatens to impair U.S. foreign relations. *Cf. Verlinden, B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493 (1983) ("Actions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States . . . ."). Such a detrimental effect on this country's foreign relations furnishes an additional reason to grant review. *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 91 (2002) (granting review, in part, because the Second Circuit's decision "implicates serious issues of foreign relations").

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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In The

Supreme Court of the United States

PT PERTAMINA (PERSERO), f/k/a PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA,
Petitioner,

v.

KARAHA BODAS COMPANY, L.L.C.,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

KBC'S OPPOSITION AND RESPONSE TO MOTION OF THE REPUBLIC OF INDONESIA FOR LEAVE TO FILE A BRIEF AS AN *AMICUS CURIAE*

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STATUTES AND RULES

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, implemented by 9 U.S.C. §§ 201 *et seq.* (the "New York Convention") ..... *passim*

MISCELLANEOUS

Frederick B. Wiener, BRIEFING AND ARGUING FEDERAL APPEALS 269 (1961) 1, 3

Pursuant to Supreme Court Rule 37.5, Respondent Karaha Bodas Company, L.L.C ("KBC") respectfully submits this opposition and response to the motion of the Government of the Republic of Indonesia ("ROI") for leave to file a brief as an *amicus curiae* in support of the petition for certiorari.

INTRODUCTION

Petitioner PT Pertamina (Persero), f/k/a Perusahaan Pertambangan Minyak Dan Gas Bumi Negara ("Pertamina") has had the opportunity to fully brief the questions presented in its petition for a writ of certiorari by filing both a 25-page initial brief and a 10-page reply brief. For the reasons set forth in KBC's brief in opposition, the petition does not present an issue warranting this Court's review. Now, the ROI – which asserts that it "has a direct interest in this case" because "[i]t is the sole owner of . . . Pertamina" – seeks leave to file an additional 19-page brief, ostensibly as an *amicus curiae*. ROI Mot. 1.[1]

The motion for leave should be denied for several reasons. As an initial matter, the ROI does not advance an interest separate from Pertamina's, but simply makes additional arguments on Pertamina's behalf. The "function of an *amicus*," however, "is to assert 'an interest of its own separate and distinct from that of the [parties].'" *United States v. Barnett*, 376 U.S. 681, 738 (1964) (quoting Frederick B. Wiener, BRIEFING AND ARGUING FEDERAL APPEALS 269 (1961)). In addition, the ROI presents a question for this Court's review not raised by Pertamina, or even addressed in the petition. *See Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 262, n.6 (1994) (declining to address a First Amendment question argued by respondents and the *amici*, but not presented for review in the petition); *Knetsch v. United States*, 364 U.S. 361, 370 (1960)

[1] Citations to "ROI Mot." are to the ROI's motion for leave; "ROI Br." citations are to the *amicus curiae* brief accompanying the motion.

(finding "no reason" to address an argument advanced only in an *amicus* brief, and not the petition).

Even if the ROI were a proper *amicus*, the questions it presents do not warrant this Court's review. The ROI argues that this Court should use this case to decide whether a federal court must apply federal common law in deciding what country's procedural law governs an international arbitration. Contrary to the ROI's argument, however, there simply is no circuit conflict on this issue: in the two appellate decisions on which the ROI relies, the courts did not decide what procedural law governed the arbitration, but instead decided whether arbitration could be compelled. *See InterGen N.V. v. Grina*, 344 F.3d 134 (1st Cir. 2003) (deciding whether a non-signatory to arbitration agreement could be compelled to arbitrate); *Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88 (2d Cir. 1999) (deciding whether assignment after effective date of arbitration clause deprived assignees of right to compel arbitration). The cases are thus inapposite to the questions presented for review by the ROI.

In addition, and as set forth in more detail below, the ROI's argument that Indonesian procedural law governed the arbitration in this case, and thus that Indonesia was an appropriate country in which Pertamina could seek to set aside the arbitral award, is wholly inconsistent with Pertamina's prior arguments (made in various courts) that *Swiss* procedural law governed the arbitration and that *Switzerland* was the appropriate country in which to challenge the arbitral award. The Fifth Circuit correctly decided that Pertamina is judicially estopped from taking the opposite position, Pet. App. 25a; that holding provides an alternative basis supporting the decision below. Moreover, the ROI's argument that the Fifth Circuit should have applied federal common law in deciding what procedural law applied is inconsistent with its (and Pertamina's)

arguments early in this litigation that the Fifth Circuit and district court should apply the New York Convention in deciding that question.

In sum, this Court should reject the ROI's attempts to further delay enforcement of a valid arbitral award based on shifting and inconsistent arguments not even presented in the petition for certiorari.

REASONS FOR DENYING THE MOTION

I. THE ROI DOES NOT HAVE AN INTEREST SEPARATE AND DISTINCT FROM PERTAMINA'S.

This Court's Rules state that a motion for leave to file an *amicus curiae* brief in support of a petition "is not favored." Sup. Ct. Rule 37.2(b). Such a motion is especially inappropriate where, as here, the proposed *amicus* has interests that are one and the same as the petitioner. As this Court has explained, the "function of an *amicus* is to assert 'an interest of its own separate and distinct from that of the [parties].'" *United States v. Barnett,* 376 U.S. 681, 738 (1964) (quoting Frederick B. Wiener, BRIEFING AND ARGUING FEDERAL APPEALS 269 (1961)).[2] The ROI's interests, however, are the exact same as those of its wholly owned subsidiary, which has been given ample opportunity to advance its interests.

Indeed, a would-be *amicus* could scarcely have interests more closely aligned with the Petitioner than the ROI. The ROI itself argues that it "has a direct interest in this case" because "[i]t is the sole owner of Petitioner [Pertamina] and . . . has directed Pertamina" to oversee on its

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[2] Other courts have found that a patently partisan party should not be allowed to participate as an *amicus curiae. See, e.g., United States v. Michigan*, 940 F.2d 143, 164-65 (6th Cir. 1991) (stating that "the orthodox view of amicus curiae was, and is, that of an *impartial* friend of the court – *not an adversary party in interest in the litigation*") (emphasis in original) (citing *Miller-Wohl Co. v. Comm'r of Labor & Indus., State of Montana*, 694 F.2d 203, 204 (9th Cir. 1982)); *Liberty Lincoln Mercury, Inc. v. Ford Mktg. Corp.*, 149 F.R.D. 65, 82 (D.N.J. 1993) ("When the party seeking to appear as amicus curiae is perceived to be an interested party or to be an advocate of one of the parties to the litigation, leave to appear amicus curiae should be denied."); *Yip v. Pagano*, 606 F. Supp. 1566, 1568 (D.N.J. 1985) ("Where a petitioner's attitude toward the litigation is patently partisan, he should not be allowed to appear as *amicus curiae*.") (citation omitted), *aff'd,* 782 F.2d. 1033 (3d Cir. 1986).

behalf "the exploration, development, and exploitation of Indonesia's oil and gas resources." ROI Mot. 1. Indeed, the ROI states that it is financially intertwined with Pertamina: "Pertamina must turn over revenues it derives . . . [and the ROI] owns most of the hundreds of millions of dollars in oil and gas revenues in trust accounts in the United States. . . ." *Id.* The ROI's assertions of interdependence and control over Pertamina demonstrate that the ROI has had ample opportunity to voice its opinions by and through its subsidiary.

Moreover, allowing the ROI to proceed as an *amicus* would, in effect, unfairly extend the page limits for petitioners strictly set forth in the Rules. *See* Sup. Ct. Rule 37.1(g). Pertamina should not be allowed "two bites at the apple."

II. THE ROI RAISES A QUESTION FOR REVIEW THAT WAS NOT PRESENTED BY PERTAMINA IN ITS PETITION FOR A WRIT OF CERTIORARI.

The petition for certiorari seeks this Court's review of whether the decision below conflicts with the decisions of other courts of appeals regarding whether a court may defer to arbitrators' determinations regarding the appropriateness of their own appointment. *See* Pet. 15-16. That issue, however, is not addressed at all by the ROI. Instead, the ROI asks this Court to decide an entirely different question: whether the lower courts should have applied federal common law in conducting a choice-of-law analysis to determine what country's procedural law governed the arbitration in this case. *See* ROI Br. 5.

That question was not raised by Pertamina or even addressed in the petition. It is well-established that this Court will not grant certiorari to address questions that were not raised in the petition, particularly if raised only by an *amicus*. *See Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 262, n.6 (1994) (declining to address a First Amendment question argued by respondents and the *amici*, but not presented for review in the petition); *Knetsch v. United States*, 364 U.S. 361, 370 (1960) (finding "no reason" to address an argument advanced only in an

amicus brief, and not the petition). Because the ROI seeks to have this Court review an issue not even discussed in the petition, the ROI's proposed *amicus* brief adds nothing to the petition for certiorari, and its motion for leave to file should be denied.

III. THE ISSUE PRESENTED BY THE ROI DOES NOT WARRANT THIS COURT'S REVIEW.

As part of its and Pertamina's continuing efforts to avoid and delay the enforcement of the arbitral award,[3] the ROI claims that this Court should grant certiorari to resolve the question of whether a court must apply federal common law to a choice-of-law analysis in deciding what country's procedural law governed an international arbitration. For several reasons, this issue does not warrant the Court's review.

First, the decision below does not conflict with the decision of any other court of appeals. Despite the ROI's contention that the Fifth Circuit's decision is in tension with decisions of the First and Second Circuits, those two cases address entirely different questions. The question before the Fifth Circuit was what procedural law governed the arbitration proceedings – which, in turn, supplied an answer to the question of what country's judicial system would have been an appropriate forum in which Pertamina could seek to annul the award. Neither case cited by the ROI analyzed this question.

The first case, *InterGen N.V. v. Grina*, 344 F.3d 134, 143 (1st Cir. 2003), addressed whether a non-signatory could compel another non-signatory to arbitrate a complex dispute; the court applied federal common law, rather than state law, in holding that a non-signatory is "not

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[3] The ROI appeared as *amicus curiae* before the Fifth Circuit, which rejected each of its arguments. *See* Pet. App. 17a. In a prior opinion arising from the same arbitration, where the ROI also appeared as an *amicus*, the court characterized Pertamina's last-minute argument that Indonesian procedural law governed the arbitration in Switzerland as "certainly sufficient grounds to find Pertamina's behavior dubious and somewhat deceptive." *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 369, n.50 (5th Cir. 2003). The Fifth Circuit also noted that Pertamina "appear[ed]" to be "acting in bad faith by pursuing annulment in Indonesia." *Id.* at 372; *see* KBC Br. 3-4.

subject to compulsory arbitration." *Id.* at 150. In an effort to claim that *InterGen* conflicts "in principle" with the Fifth Circuit's decision, ROI Br. 9, the ROI contends that the First Circuit chose to apply federal common law *over* the New York Convention. That argument is simply incorrect; the court answered the threshold question of whether non-signatories were bound by an arbitration agreement before applying the New York Convention, but then stated that "so long as the parties are bound to arbitrate. . ., the court is under an *unflagging, nondiscretionary duty* to . . . enforce the New York Convention" and compel arbitration. *InterGen,* 344 F.3d at 142 (emphasis added). *InterGen* thus had nothing to do with whether, in a case seeking to confirm an arbitral award under the New York Convention, federal common law must be applied to determine what procedural law governed the arbitration. Indeed, if anything, *InterGen* actually supports the application of the New York Convention in interpreting what procedural law governs an arbitration between signatories to an arbitration agreement.

The second case on which the ROI relies for a purported circuit conflict similarly analyzed whether a party could be compelled to arbitrate. In *Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.,* 198 F.3d 88, 95 (2d Cir. 1999), the Second Circuit addressed whether a subsequent assignee could be bound by an arbitration clause. In affirming the order compelling arbitration, the court applied federal common law, rather than state law, in holding that the parties' complex corporate relationships justified allowing an assignee to invoke an arbitration clause. As with *InterGen*, this case had nothing to do with whether, in a case seeking to confirm an arbitral award under the New York Convention, federal common law must be applied to determine what procedural law governed the arbitration. And although the ROI argues that the Second Circuit chose to apply federal common law *over* the New York Convention, ROI Br. 10, in reality the court merely chose to apply federal common law over

state law in interpreting the contract to answer the threshold arbitrability question. *Smith/Enron Cogeneration*, 198 F.3d at 96. This decision, like *InterGen*, presents no conflict with the decision below.

Second, even if a circuit conflict arguably existed regarding whether a court must apply federal common law in determining what procedural law governed an arbitration (and thus in what country a party could appropriately challenge an arbitral award), this would not be an appropriate case in which to address such a conflict. In its brief, the ROI argues that Indonesian procedural law governed the arbitration, and thus that Indonesia was the appropriate country in which to challenge the arbitral award. This argument, however, is wholly inconsistent with Pertamina's repeated and consistent arguments that *Swiss* procedural law applied to the arbitration, and that *Switzerland* was the appropriate country in which to challenge the award. As the Fifth Circuit noted, "[f]rom 1998 to April 2002, *Pertamina consistently and repeatedly took the position before the Tribunal, the Swiss courts, and the United States district court, that Swiss procedural law applied to the arbitration*." Pet. App. 16a, n.24 (emphasis added). Not until much later did Pertamina reverse course and assert that "Indonesian, not Swiss, procedural law had applied to the arbitration." Pet. App. 17a.

Based on these clear statements, the Fifth Circuit held that the district court did not abuse its discretion in holding that Pertamina was judicially estopped "from arguing against the application of Swiss procedural law." Pet. App. 25a. This holding provides an alternative ground supporting the Fifth Circuit's decision, and the ROI does not seriously contend that the district court's fact-specific holding on this issue – reviewed for an abuse of discretion – presents a question warranting this Court's review.[4]

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[4] Throughout its opinion, the Fifth Circuit described the various statements Pertamina had made in arguing that Swiss procedural law applied, including:

Third, the ROI's argument that federal common law – rather than the New York Convention – must be applied in determining what procedural law governed the arbitration is inconsistent with arguments it and Pertamina made earlier in this case. Before the ROI filed its second *amicus curiae* brief in the Fifth Circuit (on Pertamina's Rule 60(b) motion to the Fifth Circuit), the ROI and Pertamina had argued consistently that the courts should apply the New York Convention, not federal common law, in deciding what procedural law governed the arbitration. The ROI's recent attempt to argue that those courts should have instead applied federal common law is thus nothing more than another effort to improperly delay the enforcement of a valid arbitral award.

Fourth, even if the ROI were correct that the lower courts should have undertaken a choice-of-law analysis under federal common law, the ROI is wrong that such an analysis would lead to the conclusion that Indonesian procedural law governed the arbitration. Moreover, as the Fifth Circuit held, courts conduct "the multifactor choice-of-law analysis" under the Restatement (Second) of Conflicts only "in the absence of an effective choice of law by the parties to the

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> As but one example, Pertamina cited Swiss procedural law in arguing that the Tribunal could not consolidate the claims under the JOC and ESC into one proceeding. Pertamina at no point argued to the Tribunal that Indonesian procedural law applied. Pertamina initially sought to set aside the Award in a Swiss court. Pertamina asked the Texas district court to stay its enforcement proceeding until Pertamina's appeal in Switzerland was resolved. In making this argument, Pertamina stated that "[t]he arbitration . . . was conducted according to the laws of Switzerland, and the Swiss court is empowered to vacate an award rendered in Switzerland. . . . KBC is asking this Court to act prematurely to confirm an award that might be overturned in the country whose law governed the arbitration."

Pet App. 23a-24a; *see also* Pet. App. 116a (denying Pertamina's Rule 60(b) motion and specifically "reject[ing] Pertamina's assertion that the parties' contracts designate the application of Indonesian arbitral law"). Given Pertamina's consistent and unambiguous statements that Swiss procedural law applied to the arbitration, the Fifth Circuit correctly concluded that the district court had not abused its discretion in concluding that those statements satisfied this Court's standard for applying judicial estoppel against a litigant – that a "party's later position be clearly inconsistent with its earlier position." *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001). Importantly, the Fifth Circuit also noted that "[b]oth the Tribunal and the district court relied on these representations in their decision making." Pet. App. 26a.

arbitration agreement" – but in this case "the parties presumptively chose Swiss procedural law as the *lex arbitri* when they designated Switzerland as the site of the arbitration, and that presumption is unrebutted." Pet. App. 22a-23a. Moreover, as the Fifth Circuit held, "[c]ertain sections and comments of the *Restatement* [of Conflict of Laws] also support a determination that Swiss law applied to the arbitration agreement." Pet. App. 23a, n.43. The ROI is thus simply wrong to contend that the application of "the correct choice of law rule . . . is outcome-determinative in this case." ROI Br. 10. Under any reasonable interpretation of the New York Convention, the parties' agreements, and Pertamina's prior judicial statements, Swiss procedural law (and not Indonesian procedural law) governed the arbitration, and thus Indonesia was not an appropriate forum in which to challenge the arbitral award.

CONCLUSION

For the foregoing reasons, KBC respectfully requests that the Court deny the ROI's motion for leave to file its *amicus curiae* brief, and that its *amicus curiae* brief either be stricken from the record or given no weight when Pertamina's petition is considered.

Respectfully submitted,

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